[redacted]

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. 888.

[redacted]

[redacted] TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

[redacted] TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY.

[redacted] FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

[redacted]

[redacted]

(25,172)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print
Caption	1	*a*
Back of original bill of complaint	3	*a*
Title page of amendments to original bill of complaint	4	*a*
Amended bill of complaint	5	1
Exhibit "A"—Second mortgage, February 1, 1888	53	49
Exhibit "B"—Statement of expenditures	92	88
Motion to dismiss by the New Orleans Pacific Railway Co	101	97
Motion to dismiss by the Texas & Pacific Railway Co	104	98
Back of original answer of Texas & Pacific Railway Co	107	100
Title page of amendments to answer of Texas & Pacific Railway Company	108	100
Amended answer of Texas & Pacific Railway Co	109	101
Order of dismissal	161	138
Memorandum: Opinion of district judge	162	139
Plaintiff's petition for appeal and allowance	167	142
Order allowing appeal in open court	168	143
Plaintiff's assignments of error	169	143
Plaintiff's appeal bond	171	144
Præcipe for transcript	173	145
Citation and service	175	146
Clerk's certificate	178	147

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 13, 1916.

1 & 2 *Caption.*

Be it remembered, that at a term of the District Court of the United States for the Northern District of Texas, begun and holden at Dallas, Texas, on January 10th A. D. 1916, and which term is still in session, the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had upon the motions of the defendants the New Orleans Pacific Railway Company and the Texas and Pacific Railway Company to dismiss the bill of complaint in the following cause, to-wit:

No. 2795/51. In Equity.

BANKERS TRUST COMPANY, as Trustee,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY and THE NEW ORLEANS PACIFIC RAILWAY COMPANY.

3 Back of Original Bill of Complaint: Filed Dec. 27, 1915. No. 2795/51. Equity. Bankers Trust Company, as Trustee, v. The Texas and Pacific Railway Company, et al. Bill of Complaint. Filed 27 day of Dec., 1915. Louis C. Maynard, Clerk.

4 Title page of amendments to original bill of complaint: Filed February 8, 1916. In the District Court of the United States within and for the Northern District of Texas, Dallas Division. Bankers Trust Company, as Trustee, Complainant, against The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, Defendants. In Equity. No. 2795/51. Complainant's Amendments to its Bill of Complaint. Locke & Locke, Praetorian Building, Dallas, Texas, Alexander & Green, 120 Broadway, New York City, Solicitors for Complainant. Maurice E. Locke, W. W. Green, Of Counsel. Filed 8 day of February, 1916. Louis C. Maynard, Clerk, by E. C. Van Dusen, Deputy.

IN THE

1 DISTRICT COURT OF THE UNITED STATES

WITHIN AND FOR THE

NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BANKERS TRUST COMPANY, as Trustee, Complainant, AGAINST THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY 2 COMPANY, Defendants.	In Equity No. 2795/51

Amended Bill of Complaint

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION:

Bankers Trust Company, a corporation of the State of New York, brings this its amended bill of complaint against The Texas and Pacific Railway Company, a corporation duly created by and existing under the laws of the United States of America, having its 3 principal operating office and place of business in the City of Dallas in the State of Texas, and New Orleans Pacific Railway Company, a corporation of the State of Louisiana, and thereupon your orator complains and alleges:

I. That your orator Bankers Trust Company is, and at all the times wherein it is hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State

of New York, and has its office and principal place of business in the Borough of Manhattan, in the City, County and State of New
4 York, is a citizen of said State and a resident and inhabitant of the Southern District of New York, and is duly authorized and empowered to hold in trust the property conveyed to it or its predecessor, as hereinafter fully set forth, and to execute the trusts set forth and declared in the mortgage or deed of trust hereinafter referred to as the Second Mortgage.

II. That the defendant The Texas and Pacific Railway Company (hereinafter called the defendant Texas Company) is, and at
5 all the times wherein it is hereinafter mentioned was, a corporation duly created by and existing under the laws of the United States of America, and has its principal place of business and its principal operating and general offices in the City of Dallas in the State of Texas, in the Dallas Division of the Northern District of Texas, and that a material and substantial part of the railroads owned and operated by it as hereinafter described, to wit, over four hundred miles thereof, are located in said Northern District of Texas, and the defendant Texas Company is a resident and inhabitant of the said Dallas Division of said Northern District of Texas.

6 III. That the defendant New Orleans Pacific Railway Company (hereinafter called the defendant New Orleans Company) is, and at all the times wherein it is hereinafter mentioned was, a corporation duly organized and existing under the laws of the State of Louisiana, and has its principal place of business in the City of New Orleans, in said State, and is a citizen of said State and a resident and inhabitant of the Eastern District of Louisiana.

IV. Your orator further shows that, pursuant to the power conferred upon the Congress of the United States by the Constitution
7 of the United States, Congress duly enacted an Act entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes," approved on or about the third day of March, 1871 (16 U. S. Statutes at Large, 573). That in and by said Act it is provided that said the Texas Pacific Railroad Company shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States. That by virtue of said
8 Act of Congress and of said provision thereof and of the Act of Congress approved May 2, 1872 (17 U. S. Statutes at Large, 59), hereinafter in this paragraph referred to, jurisdiction was conferred upon this Court of this cause against the defendant Texas Com-

pany and this Court continues to have, and still has, jurisdiction thereof so conferred as aforesaid:

V. That said Act of Congress approved March 3, 1871, provides by Section 11 thereof:

"That the Texas Pacific Railroad Company shall have power and authority to issue two kinds of bonds, secured by mortgage, namely: first, construction bonds; second, land
9 bonds. Construction bonds shall be secured by mortgage, first, on all or any portion of the franchises, roadbed, or track of said railroad, and all the appurtenances thereto belonging, when constructed or in the course of construction, from a point at or near Marshall, to ship's channel, in the Bay of San Diego, in the State of California, as aforesaid. Land bonds shall be secured by mortgage, first, on all or any portion of the lands hereby granted in aid of the construction of said railroad as is provided for in this act; second, on lands acquired by any arrangement or purchase or terms of consolidation with any railroad company or companies to whom grants of lands may have been made, or may hereafter be made by any congressional, State or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation: *Provided*, that all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution, and shall confer all the rights and property of said company as therein expressed: *And provided also*, That the proceeds of the sales of the aforesaid
10 construction and land bonds shall be applied only in the construction, operation, and equipment of the contemplated railroad line: *And provided further*, That said mortgage shall in no wise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation."

And in Section 14 thereof:

"* * * All the bonds and mortgages issued by said company must be signed by the president and secretary, and attested by the seal of said company, and shall contain an extract from the law authorizing them to be issued. The face value of said bonds shall be one thousand dollars in gold, and shall be redeemable at such times, and to bear such rate of interest payable semi-annually in gold, as may be determined by the directors. The total value of the construction bonds to be issued shall not exceed thirty thousand

dollars per mile of said railroad, and the total face value of the land bonds shall not exceed two dollars and fifty cents per acre for all lands mortgaged; the total amount of each to be determined by the board of directors."

That pursuant to the power conferred upon it by the Constitution of the United States, Congress duly enacted an act entitled "An Act supplementary to an Act entitled 'An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and for other Purposes,' approved March third, eighteen hundred and seventy one", approved on or about May 2, 1872 (17 U. S. Statutes at Large, 59), which among other things provides:

"That the name, style and title of the Texas Pacific Railroad Company shall hereafter be "The Texas and Pacific Railway Company;" and the said The Texas and Pacific Railway Company shall have, possess and enjoy all the rights, privileges and franchises heretofore conferred upon the said Texas Pacific Railroad Company.

"SEC. 2. That the said The Texas and Pacific Railway Company shall have power and authority to issue the construction and land bonds authorized by the eleventh section of said act of incorporation, for such amounts, not exceeding forty thousand dollars per mile of said road, of construction bonds, as said company may deem needful to provide for the construction and equipment of its line, and to include in the mortgage or mortgages to secure said construction bonds all or any portion of the lands granted in aid of the construction of said railroads; and in the mortgage or mortgages to secure said land bonds, any portion of said lands not so used to secure the construction bonds aforesaid; and all or any portion of the lands acquired by the terms of consolidation lawfully authorized by the fourth section of said act of March third, eighteen hundred and seventy-one, with any railroad company or companies to whom grants of land may have been made, or may hereafter be made, by any congressional, State, or territorial authority, or who may have purchased the same previous to any such arrangement or consolidation, and within the time limited for the completion of the road, and all such lands of every description shall be subject to all limitations and conditions now by law existing in relation thereto, and as modified by this act; and this act shall not be construed to revive, enlarge, extend or create any land grant whatever, beyond that heretofore granted by Congress, and which shall duly inure to said company upon

compliance with the terms of this act in relation to the times fixed for the completion of said railway, and all such mortgages shall be subject to all the conditions and limitations
14 by law existing under this act and the acts to which it is supplementary in respect of such lands, and shall not be held to vest any title in the mortgage or create any lien on such lands, other than such company is or may become lawfully entitled to vest or create thereunder; but the amount of said land bonds shall not exceed two and a half dollars per acre for all lands covered by the mortgage or mortgages securing the same.

"SEC. 3. That all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be a sufficient evidence of their legal execution: *Provided*, That the aforesaid bonds and the authorized capital stock, or the proceeds thereof, shall be applied only for the purpose of securing the construction, operation and equipment of the contemplated railroad line, under lawful contracts with such par-
15 ties, and on such terms and conditions as said company may deem needful, and for the further purpose of purchase, consolidation, completion, equipment, and operating of the other roads, as contemplated by said act and specified therein, being a part of the aforesaid railroad line, and for the expenses necessary and incident to the works authorized thereby: *Provided, however*, That said road and its equipment shall be of the standard heretofore required by the United States Government for the existing Pacific Railway lines: *And provided further*, that said mortgage or mortgages shall in no wise impair or affect any lien existing on the property of said company or companies at or before the time of such consolidation."

That pursuant to the power conferred upon it by the Constitution of the United States, Congress duly enacted an act entitled "An Act supplemental to an Act entitled 'An Act to incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its Road, and
16 for other Purposes,' approved March third, eighteen hundred and seventy-one", approved on or about March 3, 1873 (17 U. S. Statutes at Large, 598), which provides:

"That the face value of all bonds hereafter issued by the Texas and Pacific Railroad Company, under the provisions of an act approved March third, eighteen hundred and seventy-one, shall, at the option of the company, be either in gold, or other lawful money of the United States,

bearing interest, at like option of the company, either in gold or other lawful money of the United States; and any mortgage heretofore executed by said company, securing bonds payable in any lawful money of the United States other than gold, and the bonds recited therein, and to secure which, said mortgage was given, are hereby legalized, and said mortgage and bonds shall have the same effect as though they had been authorized by the act to which this is
17 a supplement. *Provided*, That in all other respects the requirements of that law in regard to such mortgage and bonds have been fully complied with".

That pursuant to the power conferred upon it by the Constitution of the United States, Congress duly enacted an act entitled "An act supplementary to the act entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes'", approved on or about June 22, 1874 (18 U. S. Statutes at Large, 197), which, among other things, provides:

18 "That the Texas and Pacific Railway Company is hereby empowered to secure, by one or more mortgages upon the whole or any portion of its line, the construction-bonds heretofore authorized to be issued, and to cancel the mortgage now on record with the Secretary of the Interior so far as the same can be done without prejudice to existing rights, and to substitute therefor the mortgage or mortgages hereby authorized, which substituted mortgages shall expressly reserve all rights which may have been acquired under the existing mortgage: *Provided*, That the aggregate of the said bonds to be issued under and secured by said mortgage or mortgages shall not exceed the limit heretofore fixed by Congress; and said mortgages for the division east of Fort Worth shall embrace the roads and property of the Southern Pacific Railroad Company and of the Southern Trans-continental Railway Company, heretofore merged in and consolidated with the said Texas and Pacific Railway Company, under the authority and requirements of the laws of the State of Texas; and which roads so merged as aforesaid shall for that and all other purposes be deemed and taken to be a part of the said Texas and Pacific Railway Company, and
19 shall hereafter be subject to all the provisions and limitations of the act of Congress incorporating said company and of the supplements thereto: * * * "

VI. That said Act of Congress approved March 3, 1871 (16 U. S. Statutes at Large 573), by Section 4 thereof provides:

> "That the said Texas Pacific Railroad Company shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the parties, with any railroad company or companies heretofore chartered by congressional, State, or territorial authority, on the route prescribed in the first section of this act; but no such consolidation shall be with any competing through line of rail-
20 roads to the Pacific Ocean."

And by Section 6 thereof:

> "That the rights, lands, land grants, franchises, privileges, and appurtenances, and property of every description, belonging to each of the consolidated or purchased railroad company or companies, as herein provided, shall vest in and become absolutely the property of the Texas Pacific Railroad Company; *Provided*, that in all contracts made and entered into by said company with any and all other railroad company or companies, to perfect such aforesaid consolidation or purchase, the indebtedness or other legal obligations of said company or companies shall be assumed by the said Texas Pacific Railroad Company as may be agreed upon, and no such consolidation or purchase shall impair any lien which may exist on any of the railroads so consolidated or purchased; but said Company shall not assume the debts or obligations of any company with which it may consoli-
21 date or purchase as aforesaid, to an amount greater than the cash value of the assets received from the same."

VII. Your orator is informed and believes and therefore alleges that by an act of the legislature of the State of Texas approved on or about February 16, 1852, entitled "An act to incorporate the Texas Western Railroad Company" there was created a corporation by the name of Texas Western Railroad Company; that thereafter by an act of the legislature of the State of Texas approved on or about August 16, 1856, entitled "An act to amend the caption and
22 the first and sixteenth sections of an act to incorporate the Texas Western Railroad Company, approved February 16, 1852" the name of said Texas Western Railroad Company was changed to Southern Pacific Railroad Company; and that on and prior to the twenty-first day of March, 1872, said Southern Pacific Railroad

Company, duly created by and existing under said acts and the laws of the State of Texas, owned, possessed and operated certain lines of railroad located in the State of Texas on the route prescribed for the defendant Texas Company in said acts of Congress, and by virtue of said acts and certain other laws of said State of Texas said Southern Pacific Railroad Company was authorized and empowered to issue bonds of the character of the bonds described in the Second Mortgage of the
23 defendant Texas Company, of which a copy is hereto annexed marked Exhibit A (hereinafter called the Income Bonds), and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about the twenty-first day of March, 1872, said Southern Pacific Railroad Company by indenture bearing that date duly sold and conveyed to the defendant Texas Company all the railroads, franchises, rights, privileges, grants and property of said Southern Pacific Railroad Company, and consolidated itself with the defendant Texas Company by sale, and the defendant Texas
24 Company, in compliance with the terms and conditions prescribed by said acts of Congress and by the laws of the State of Texas, and by virtue of the power and authority conferred upon it by said acts and laws, purchased and acquired by said indenture all said railroads, franchises, rights, privileges, grants and property; and by virtue of the provisions of said acts of Congress and of said laws of Texas and of said sale, conveyance and consolidation, said rail-
25 roads, franchises, rights, privileges, grants and property vested in and became absolutely the property of the defendant Texas Company.

VIII. Your orator is informed and believes and therefore alleges that by an act of the legislature of the State of Texas approved on or about July 27, 1870, entitled "An Act, to incorporate The Southern Trans-Continental Railway Company" there was created a corporation by the name of The Southern Trans-Continental Railway Company; and that on and prior to the thirtieth day of March, 1872, said Southern Trans-Continental Railway Com-
26 pany, duly created by and existing under said act and the laws of the State of Texas, owned, possessed and operated certain lines of railroad located in the State of Texas on the route prescribed for the defendant Texas Company in said acts of Congress, and by virtue of said acts and certain other laws of the State of Texas said Southern Trans-Continental Railway Company was authorized and

empowered to issue bonds of the character of the Income Bonds
27 and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about said thirtieth day of March, 1872, said Southern Trans-Continental Railway Company by indenture bearing that date duly sold and conveyed to the defendant Texas Company all the railroads, franchises, rights, privileges, grants and property of said Southern Trans-Continental Railway Company, and consolidated itself with the defendant Texas Company by sale, and the defendant Texas Company, in compliance with the terms and conditions
28 prescribed by said acts of Congress and by the laws of the State of Texas, and pursuant to the power and authority conferred upon it by said acts and laws, purchased and acquired by said indenture all said railroads, franchises, rights, privileges, grants and property ; and by virtue of the provisions of said acts of Congress and of said laws of Texas and of said sale, conveyance and consolidations, said railroads, franchises, rights, privileges, grants and property vested in and became absolutely the property of the defendant Texas Company.

29 IX. Your orator is informed and believes and therefore alleges that on and prior to the first day of May, 1872, Memphis, El Paso & Pacific Railroad Company, a corporation duly created by and existing under acts of the legislature of the State of Texas approved respectively on February 4, 1856, February 5, 1856, August 25, 1856, February 10, 1858, February 7, 1861 and March 20, 1861, and the laws of the State of Texas, owned, possessed and operated certain lines of railroad located in said State of Texas on the route prescribed for the defendant Texas Company in said acts of Congress, and by virtue of said acts and certain other laws of the State of Texas said Memphis, El
30 Paso & Pacific Railroad Company was authorized and empowered to issue bonds of the character of the income bonds and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about the first day of May, 1872, all the franchises, rights, grants and other property of said Memphis, El Paso & Pacific Railroad Company were sold under a decree of foreclosure to Enoch L. Fancher, as Trustee for certain bondholders of said
31 Memphis, El Paso & Pacific Railroad Company ; that in compliance with the terms and conditions prescribed by said acts of Congress and by the laws of the State of Texas, and pursuant to

the power and authority conferred upon it by said acts and laws, and also pursuant to an order of court duly made and entered on the twenty-second day of October, 1872, authorizing the sale by said Enoch L. Fancher and the receiver theretofore appointed in the suit for said foreclosure, of the franchises, rights, grants and other property of the Memphis, El Paso & Pacific Railroad Company to the defendant Texas
32 Company, the defendant Texas Company by indenture executed and delivered to it by said Fancher and said receiver on or about the twelfth day of June, 1873, purchased and acquired said property, rights, grants, privileges and franchises of said Memphis, El Paso & Pacific Railroad Company; and by virtue of the provisions of said acts of Congress and of said laws of Texas and of said sale and conveyance, all said property, rights, grants, privileges and franchises vested in and became absolutely the property of the defendant Texas Company.

33 X. Your orator is informed and believes and therefore alleges that on and prior to the twentieth day of June, 1881, the defendant New Orleans Company, a corporation organized and existing under the laws of the State of Louisiana, owned, possessed and operated certain lines of railroad, constructed and to be constructed, located in the State of Louisiana and connecting with the then lines of the defendant Texas Company and had purchased certain grants of land which had theretofore been made by an act or acts of the Congress of the United States to one or more other railroad companies.

34 That by virtue of the notarial charter of the defendant New Orleans Company (being an act passed before John G. Eustis, notary, at the City of New Orleans, June 29, 1875, and duly recorded), and by virtue of act No. 14 of the legislature of the State of Louisiana entitled "An Act To confirm the notarial charter of the New Orleans Pacific Railway Company; to extend the term of existence of said Company and to confer thereon certain powers and franchises" approved on or about February 19, 1876, and act No. 12 of the State of Louisiana entitled "An Act
35 to amend section eleventh of article three (3) of the Charter confirmed by Act number fourteen, eighteen hundred and seventy-six, entitled 'An Act to confirm the notarial charter of the New Orleans Pacific Railway Company, with amendments thereto; to extend the term of existence of said company, and to confer thereon certain powers,' and to empower said company to mortgage all its

future rights, properties and franchises to secure its bonds," approved on or about February 5, 1878, and by virtue of certain other laws of the State of Louisiana, the defendant New Orleans
36 Company was authorized and empowered to issue bonds of the character of the Income Bonds and to mortgage its railroads, franchises and other property to secure the payment of such bonds.

That on or about the twentieth day of June, 1881, the defendant New Orleans Company, by Articles of Consolidation bearing that date, duly sold and conveyed to the defendant Texas Company all the railroads, rights, privileges, franchises and property of the defendant New Orleans Company other than certain land grants therein specifically excepted, and consolidated itself with the defendant Texas Compa[illegible] by sale; it being further provided in said
37 Articles of Consolidation that the franchises of the defendant New Orleans Company to be and remain a corporation was not to be impaired by said Articles; that the defendant Texas Company, in compliance with the terms and conditions prescribed by said acts of Congress and by the laws of the State of Louisiana, and pursuant to the authority conferred upon it by said acts and laws, purchased and acquired by said Articles of Consolidation said railroads, rights, privileges, franchises and property; and by virtue of the provisions of said acts of Congress and of said laws of
38 Louisiana and of said Articles of Consolidation, said railroads, rights, privileges, franchises and property, other than said land grants and franchises to be and remain a corporation, vested in and became absolutely the property of the defendant Texas Company.

XI. Your orator is informed and believes and therefore alleges that by virtue, among other things, of said acts of Congress, of said laws of the States of Texas and Louisiana, and of said pur-
39 chases, conveyances and consolidations aforesaid, the defendant Texas Company, at the time of the execution of its Second Mortgage hereinafter referred to, to-wit, on or about February 1, 1888, owned, possessed and operated certain lines of railroad extending from a point on the State line between the States of Louisiana and Texas, near Marshall, Texas, to Fort Worth, Texas, and known as the main line; also extending from Texarkana on the State Line between the States of Texas and Arkansas via Sherman, Texas, to a junction with the main line aforesaid at Fort Worth, Texas, and from Marshall, Texas, on said main line via Jefferson to said Texarkana; and extending from Fort Worth, Texas, to a junction
40 with the Southern Pacific Railway at Sierra Blanca, Texas,

together with the right to joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company, between Sierra Blanca and El Paso, Texas; and also extending from Shreveport, Louisiana, to Gouldsboro, Louisiana, opposite the City of New Orleans, including a branch to Baton Rouge, Louisiana, together with a leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad (otherwise known as the Vicksburg, Shreveport and Pacific Railroad), extending from
41 Shreveport in the State of Louisiana to a connection with said main line of the defendant Texas Company at the State line between Louisiana and Texas, and now owns and operates the same excepting said leasehold (in lieu of which leasehold the defendant Texas Company now owns and operates a substituted line of railroad from Waskom, Texas, via Reisor to Shreveport, Louisiana), and also then owned and operated, and now owns and operates, certain branches of said lines of road and possessed, and now possesses, certain other rights, property and lands in said States of
42 Louisiana and Texas, all of which said lines of railroad and property (except said substituted line) are more particularly described in the Second Mortgage of the defendant Texas Company hereinafter referred to; and the defendant Texas Company also owned, used and operated, and now owns, uses and operates, in and in connection with its regular railroad business certain rolling stock and equipment and other property, both real and personal, and rights, privileges and franchises appurtenant to or used in connection with its said lines of railroad; that the lines of railroad in the State of
43 Texas so owned by the defendant Texas Company at the date of the execution of said Second Mortgage aggregated approximately one thousand and thirty-nine miles in length, and the lines of railroad so owned by it in the State of Louisiana at said date aggregated approximately three hundred and thirty-six miles, making a total of approximately one thousand three hundred and seventy-five miles; and that the defendant Texas Company now owns and operates approximately one thousand and thirty-nine miles of railroad in the
44 State of Texas, approximately seven hundred and seventy-nine miles of railroad in the State of Louisiana, and approximately thirty-two miles of railroad in the State of Arkansas.

XII. Your orator is informed and believes and therefore alleges that on or about the first day of February, 1888, by virtue of the power and authority conferred upon it by said acts of Congress hereinabove mentioned and of the authority contained in said laws

of the States of Texas and Louisiana and for the purpose of retir-
45 ing and adjusting certain mortgage indebtedness of the defend-
ant Texas Company theretofore incurred, and pursuant to
lawful authority and due corporate action, the defendant
Texas Company duly authorized the creation and issue of its Second
Mortgage Income Bonds (hereinafter called the Income Bonds),
limited to the principal amount of Twenty-five million dollars
($25,000,000), to be payable December 1, 2000, and to bear interest
payable (subject to certain restrictions contained in the Second
Mortgage hereinafter mentioned) out of the net income of the de-
fendant Texas Company as the same might be determined by its
46 Board of Directors, at the rate of five per cent. per annum from
December 1, 1887, such interest being payable annually on the first
day of March in each year, the first payment, if any, to be due
March 1, 1889, provided that interest thereon should be payable to
the extent only that such net income, if any, should permit, and
that interest thereon should be non-cumulative.

XIII. Your orator is informed and believes and therefore
alleges that in order to secure equally the payment of the principal
47 and interest of the Income Bonds at any time outstanding in
accordance with the provisions thereof, and pursuant to
due corporate action on the part of the defendant
Texas Company and of the defendant New Orleans
Company, and for and in consideration of the premises and
of the sum of one dollar to the defendant Texas Company
and the defendant New Orleans Company duly paid by The Mer-
cantile Trust Company, a corporation duly organized and existing
under the laws of the State of New York, as Trustee, at or before
the ensealing and delivery of said mortgage, and for other valuable
considerations, the defendant Texas Company, acting in pursuance
48 of due authority conferred upon it by said acts of Congress and
said laws of the States of Texas and Louisiana, and the defend-
ant New Orleans Company, acting in pursuance of due
authority conferred upon it by said laws of the State of
Louisiana, did, on or about February 1, 1888, duly make and exe-
cute under their respective corporate seals and deliver to said The
Mercantile Trust Company, as Trustee, a mortgage or deed of trust,
dated February 1, 1888 (hereinafter called the Second Mortgage), a
copy whereof is hereto annexed marked Exhibit A and made a part
hereof, wherein and whereby the defendant Texas Company and
49 the defendant New Orleans Company granted, bargained, sold,

aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, mortgaged, hypothecated and affected unto said The Mercantile Trust Company, as Trustee, and its successors and assigns, all and singular the railroads, property, franchises, rights and privileges of the defendant Texas Company, and of the defendant New Orleans Company, more particularly described in said Second Mortgage as follows:

50 "All of the Texas and Pacific Railway Company's line of Railway, extending from a point on the State line between the States of Louisiana and Texas westwardly to Marshall and from Marshall by way of Dallas to Fort Worth, in the State of Texas; and from Texarkana on the State line between Texas and Arkansas, to its junction via Clarksville, Paris, Bonham, Sherman, and Whitesboro with the main line aforesaid at Fort Worth; and from Marshall aforesaid through the town of Jefferson to its junction at or near Texarkana, with the said line from Texarkana to Fort Worth; and from Fort Worth aforesaid to a Junction with the Southern Pacific Railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio Railroad. Also the right of joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about ninety miles; and also the right of way and partially constructed line of railroad from Sierra Blanca to El
51 Paso, subject to the right however to issue bonds at the rate of ten thousand dollars a mile on said line from Sierra Blanca to El Paso, for the purpose of completing the same, and to secure the said bonds by a first mortgage which shall be prior in lien to this present instrument, upon said line from Sierra Blanca to El Paso, and also its leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad, extending from Shreveport, in the State of Louisiana, to a connection with the main line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, being a total mileage of about eleven hundred and fifty miles; and also the road whether acquired or constructed by and formerly belonging to the New Orleans Pacific Company, now the property of the Texas and Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, said last-mentioned road from Shreveport
52 to Gouldsboro, including said branch, being about three hundred and thirty-six (336) miles, and which includes the railway and railway property acquired from Morgan's Louisiana

and Texas Railroad and Steamship Company by deed of February 15th, 1881, hereinafter mentioned; also all appurtenant lands acquired and all existing tracks, extensions, and connections, including all additions, extensions and improvements constructed during the receivership under the proceedings instituted in the Circuit Court of the United States for the Fifth Circuit; also the right, title, and interest of the said Railway Company of, in, and to the Gordon Coal Mine and lands connected therewith in Palo Pinto county, Texas, and the spur of railroad of about six miles leading to said mine; also all of the terminal properties in Westwego, Gouldsboro and New Orleans, described as follows:

All the property in the city of New Orleans, State of Louisiana, conveyed by Greenville M. Dodge to the Texas
53 and Pacific Railway Company, by deed dated June 27th, 1883, which deed was registered in the conveyance office at New Orleans, August 9th, 1883, in Book 119, folios 208 to 212, which said deed is hereby referred to and made part hereof; for greater certainty, said property is described as follows:

1. The whole of the square bounded by Front, Water, Terpsichore, and Thalia streets, in the First District of the city of New Orleans, State of Louisiana, with all improvements thereon.

2. A certain portion of ground with all improvements thereon, forming the corner of Terpsichore and Water streets, and Terpsichore and Pilie streets. Also all the rights as riparian owner and rights of accretion in front of the New Orleans Cotton Press extending to the Mississippi river.

3. Certain lots of ground with all the buildings and improvements thereon, situated in the First District in the square bounded by Pilie, Water, Thalia, and Terpsichore streets, composing the whole of the square bounded as
54 above, together with a certain portion of ground bounded by Thalia, Pilie, and Terpsichore streets, and the Mississippi river and its riparian rights.

4. A certain piece of ground with all improvements thereon, in the First District on Front street, between Henderson and Terpsichore streets, extending to the Mississippi river, forming the apparent corner of Front and Terpsichore streets and having about one hundred and twenty-eight feet front on Front street, with its riparian rights.

5. A certain piece of ground situated in the Sixth District of the city of New Orleans, with all the improvements thereon, bounded in front by the Mississippi river, in the rear by Tchoupitoulas or Levee street; on the lower line by Henry Clay avenue, and on the upper line by the New Orleans Park. All said property is more fully described in said deed of said Dodge hereunto referred to, and made part

hereof, and forms part of the terminals of said railway in New Orleans.

55 6. Also the thirty-eight lots, squares and portions of ground, with all buildings thereon, situated in the town of Gouldsboro, formerly McDonoughville, in the Parish of Jefferson, State of Louisiana, on the right bank of the Mississippi river, as set forth and described in a certain deed from G. M. Dodge to the Texas and Pacific Railway Company, dated 27th June, 1883, and recorded in said Parish, August 13th, 1883, in Conveyance-book P, folios 495 to 502, inclusive, hereby referred to and made part hereof, and described as therein shown and being in the yard limits and forming part of the terminals of said railway on the right bank of said river.

7. Also lots 14 and 15 in square 37, bounded by Adams, Jefferson, Copernicus, and American streets, in the town of Gouldsboro, described in a certain deed dated July 21st, 1883, from Thomas Carr to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folio 481, and hereby made part hereof, and forming part of said
56 last-named terminals in said limits.

8. Also square of ground No. 52 in the town of Gouldsboro, bounded by Jefferson, Madison, Potolemy, and Lawrence streets, containing twelve lots described in a certain deed dated January 26th, 1883, from Pierre Nougue to the Texas and Pacific Railway Company, duly registered in Book B, New Orleans, 116, folio 732; in Jefferson Book B, folio 280, 281, which deed is referred to for greater certainty and made part hereof, and forming part of said last-named terminals in said limits.

9. Also five certain lots of ground situated on the right bank of the Mississippi river opposite New Orleans, in the town of Gouldsboro, in square No. 14, bounded by Adams, Copernicus, Americus streets, and the Levee, as described in a deed dated 9th December, 1882, from Louis Schwartz to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folios 232 and 233, and made part hereof for greater certainty, and forming part of said last-
57 named terminals.

Also the lot on the actual corner of Front and Terpsichore streets, in the city of New Orleans, having forty-seven feet front on Front street, more or less, and extending to the Mississippi river, the legal line of Terpsichore street being its northerly boundary, and with the riparian rights, and forming part of the terminals of the Railway Company in New Orleans.

Also all and singular that certain tract and parcel of land situate in the parish of Jefferson, in the State of Louisiana, on the right bank of the Mississippi river, which

was sold and conveyed to the New Orleans Pacific Railway Company by the Morgan's Louisiana and Texas Railroad and Steamship Company, by deed dated the fifteenth day of February, 1881, with other property, for the consideration of $745,110.42, which said deed is duly recorded in Book of Conveyances N. 32, folio 199, &c., Parish of Ascension, on the seventeenth day of February, 1881, and which land, comprising about one hundred and seventy-three acres, more or less, forms part of the terminals of said railway at Westwego. Also the tract of land of eighty acres, more or less, at
58 Wheelock, parish of Iberville, forming relay station. Also the transfer steamer "Gouldsboro," at New Orleans, her tackle, apparel, furniture, and machinery, and the new transfer boat now being built at New Orleans. Also all the rights, privileges, and franchises conferred by the city of New Orleans and other municipal corporations on the New Orleans Pacific Railway Company and its assigns, the Texas and Pacific Railway Company, by ordinance or grant.

Also all and singular the terminal properties and facilities, and their appurtenances, situated in Westwego, Gouldsboro, and New Orleans, and now in the possession and use of the said Texas and Pacific Railway Company in the conduct and operation of its road and the transaction of its business, whether acquired by donation, purchase or expropriation, including steamboats, warehouses, and docks; and including and intending to include in these presents the road-bed and superstructure and the right of way of said rail-
59 road, rails, tracks, side tracks, bridges, viaducts, buildings, depots, station-houses, car-houses, engine-houses, shops, warehouses, turntables, water-stations, fences, structures, erections, fixtures, and appurtenances, and all other things of whatever kind thereunto belonging or in anywise appertaining, or which have been or may be acquired or provided for use upon or in connection with the said railroad; and all lands acquired or designed for depots, warehouses, and all other structures at either terminus, as well as along the line of said road; and also all gravel pits and sand pits at any time heretofore acquired for the use of said road, all the locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels, now or hereafter belonging or appertaining to said railroad, and all property, both real and personal, of every kind and description which shall hereafter be acquired for use upon or in connection with, or for the purposes of the said railroad, and whether acquired heretofore or hereafter
60 by said Railway Company or its Receivers; and all the corporate rights, privileges, and franchises which the said Railway Companies, or either of them, have and can ex-

ercise or shall hereafter acquire or possess, of, in, to, upon, or in respect of the said railroad, or any part thereof, or necessary for the construction, maintenance, or operation of said railroad between said points, or anything belonging or appertaining, or which may hereafter belong or appertain to the same, or any part thereof, and all the rents, issues, profits, tolls, and other income of the said railroad, and all the rights, privileges and franchises whatsoever which the said Railway Companies now possess, own, or are entitled to, and all rights, privileges, and franchises, properties real and personal, and rights and things which the said Railway Companies may or shall acquire, possess or become entitled to for the purposes of or in connection with the said railway, or in the operation, use, and maintenance thereof, and all the corporate and other franchises of the said railway companies, including their franchises to be corporations. Including all the franchises,
61 rights, privileges, and property acquired from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Vicksburg, Shreveport and Texas Railroad Company, and the New Orleans Pacific Railway Company."

XIV. All of the above-described premises, railroads, property, rights, franchises and appurtenances were in and by said Second Mortgage granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, set over, mortgaged, hypothecated and affected to said The Mercantile Trust Company, as Trustee, and its lawful successors or successor, heirs, executors,
62 administrators and assigns forever, to and for the only proper use and behoof of said The Mercantile Trust Company, as Trustee, and its successors or successor, heirs, executors, administrators and assigns forever, subject, however, to the "First Mortgage" or deed of trust to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Trustee, bearing even date with said Second Mortgage, to secure bonds, amounting to $25,000,000, and to the payment of all the bonds issued or to be issued thereunder,
63 as well as the School Fund Loan and the mortgage on the Eastern Division in said "First Mortgage" referred to; and also subject to the right of the defendant Texas Company, with the assent of two-thirds of the members of its Board of Directors, to protect its business by the construction or acquisition of branch or connecting lines, and to mortgage the branches so constructed or acquired at a rate not exceeding $12,500 a mile, and at a rate of interest not exceeding five per cent. per annum, or

to assume existing mortgages of no greater amount per mile or rate of interest on branch or connecting lines, and to contract that
64 the amount required to pay the interest upon the bonds so issued or assumed should be made a rental charge, and in case of any deficiency in the earnings of said branch lines to meet such rental charge, that the same should be made up out of the earnings of the lines of railway and property mortgaged under the Second Mortgage and before payment of interest on the Second Mortgage, the sum necessary to meet such deficiency to be a charge upon the income of the defendant Texas Company prior to the interest upon the Income Bonds; but in trust, nevertheless, for the equal *pro*
65 *rata* benefit and security of all and every the persons, firms, or corporations who might be or become holders of the Income Bonds issued under and secured by the Second Mortgage without preference, priority, or distinction as to lien or otherwise of any one over the others, by reason of priority in time of issuing or negotiating the same, and so that each and all of the Income Bonds, issued and to be issued as aforesaid, should have the same right, lien and privilege under and by the Second Mortgage, and should all be equally secured
66 thereby, with like effect as if they had all been made, executed, delivered, and negotiated simultaneously on the date of the execution and delivery thereof, it being intended that the lien and security of all of said bonds should take effect from the date of the execution and delivery of the Second Mortgage, whether the same should actually be sold or disposed of at such date, or whether they or any part of them should be negotiated and sold at some future date, and that the lien and security of the Second Mortgage, and all the Income Bonds that might be issued under the same, should take effect from the date of the execution and delivery of the
67 Second Mortgage as though actually sold and delivered to and in the hands of innocent holders for value upon such date and the lien and security of the Income Bonds should in no manner be altered, impaired, or prejudiced by the creation of subsequent mortgages by the defendant Texas Company or by the entry or acquisition of judgments or liens in any form by creditors at any future time.

XV. Your orator is informed and believes and therefore alleges that subsequently to the execution and delivery of the Second
68 Mortgage, the same was duly filed and recorded in the Department of the Interior of the United States of America and was duly re-

corded in each county of the State of Texas and each Parish of the State of Louisiana in which the lines of railroad and property of the defendant Texas Company and the defendant New Orleans Company covered by said mortgage are situated or located.

XVI. That said The Mercantile Trust Company duly accepted the trusts created by the Second Mortgage and united in the execution thereof to evidence such acceptance; that thereafter and
69 on or about the tenth day of August, 1911, said The Mercantile Trust Company, pursuant to proceedings duly and regularly taken and had, in compliance with the provisions of the statutes of the State of New York applicable thereto, became merged into your orator, Bankers Trust Company, which thereupon and thereby became and is now duly, lawfully, fully and entirely vested with all the rights, property, duties, powers, trusts, relations and obligations of said The Mercantile Trust Company, including all rights, property, duties, powers, trusts, relations and obligations of said
70 The Mercantile Trust Company, as Trustee, under the Second Mortgage.

XVII. Your orator is informed and believes and therefore alleges that the Second Mortgage was and is the proper act and deed of the defendant Texas Company and of the defendant New Orleans Company, and was by said defendants and each of them authorized, made and delivered in all respects in conformity with law; and that said mortgage was and is a valid conveyance for the purposes therein stated and now constitutes a valid and subsisting lien upon
71 all the property and franchises therein mentioned, as hereinbefore set forth, and upon other property and franchises which have become subject to the lien of said mortgage.

XVIII. Your orator is informed and believes and therefore alleges that since the date of the execution and delivery of the Second Mortgage, the defendant Texas Company has from time to time acquired certain other property, real and personal, rights and interests (the exact character, description and extent of which are at present unknown to your orator) which have become subject to the
72 lien of the Second Mortgage, and that for the proper protection and enforcement of the rights of your orator and of the holders of the Income Bonds, it is necessary for the defendant Texas Company to account to your orator in this suit for all property, rights and interests owned by the defendant Texas Company at the date of the execution and delivery of the Second Mortgage, and for all property, rights and

interests subsequently acquired by the defendant Texas Company, in order that said property, rights and interests or so much thereof as is subject to the lien of the Second Mortgage may be so declared
73 and decreed by this Honorable Court.

XIX. From time to time subsequently to the execution and delivery of the Second Mortgage and prior to the date of the filing of this bill, your orator's predecessor, said The Mercantile Trust Company, as Trustee under the Second Mortgage, duly authenticated $25,000,000 face value of the Income Bonds, which bonds as your orator is informed and believes had been theretofore duly executed
74 by the defendant Texas Company pursuant to authority of law and due corporate action, and thereupon each and all of said bonds were duly delivered to the defendant Texas Company pursuant to the terms of the Second Mortgage. Your orator is informed and believes and therefore alleges that all of said Twenty-five million dollars ($25,000,000) face value of the Income Bonds have been duly issued by the defendant Texas Company, and are now outstanding in the hands of *bona fide* holders for value and are the lawfully created, valid and existing obligations of the defendant Texas Company.

75 XX. The Second Mortgage (Exhibit A), in and by various articles thereof, provides among other things as follows (the railway company therein sometimes referred to as the "Railway Company" or "said Company" being the defendant Texas Company), viz.:

> "ARTICLE ONE.—The bonds to be issued under and secured by these presents, hereinafter designated as Second Mortgage Bonds, shall not exceed in the aggregate $25,000,000; and whereas, The Bonds to be issued under and secured by this mortgage, or so many thereof as shall be necessary, are together with certain bonds to be issued under the first mortgage of contemporaneous date herewith to be used for
> 76 the purpose of exchanging into the bonds of the Railway Company and of the New Orleans Pacific Railway Company which have been deposited under the said Plan of Reorganization and secured by the mortgage of the Railway Companies known as the Eastern Division Consolidated Mortgage, the New Orleans Pacific Division Mortgage, the Rio Grande Division Mortgage, and the General and Terminal Mortgage, and of settling with the holders of the Land Grant Bonds, and it may be unadvisable or impracticable to secure the immediate satisfaction or release of the said mortgages, it is further covenanted and agreed that the bonds issued under the said several mortgages, and deposited under the said

plan, shall be transferred and delivered to the trustee of the first mortgage to be held as security for the bonds to be issued under this present indenture of mortgage and a first mortgage to be issued by the Railway Company cotemporaneously herewith, until the said mortgages shall have been satisfied, or, in the judgment of the trustee of the first mort-
77 gage, it is prudent to cause the bonds so transferred and delivered to be cancelled.

ARTICLE TWO.—Until default shall be made by the said Texas and Pacific Railway Company, its successors or assigns, in the due and punctual observance and performance of any one or more of the covenants and agreements herein contained, on the part and behalf of said Railway Company, its successors and assigns, to be kept and performed; the said Railway Company, its successors and assigns, shall be suffered and permitted to have the actual possession of the railway property and premises hereinbefore described, and of the whole thereof, to use and employ the same and every part thereof, and to exercise and enjoy all the rights and franchises appertaining thereto, and to collect, receive, and use the tolls, incomes, rents, issues, and profits thereof, in any manner, which will not impair the lien created by these presents.

78 ARTICLE THREE.—And the said Texas and Pacific Railway Company, in consideration of the premises, covenants, promises, and agrees:

I. That having possession, as aforesaid, it shall and will well and truly pay off and discharge, or cause to be paid off and discharged, each and every tax, assessment, or other liability and governmental charge, which may, from time to time, be lawfully levied or imposed by competent authority upon the said railway property and premises or upon any part thereof, the lien whereof might or could be held to be superior to the lien of these presents, and also the interest which from time to time may become due and payable upon any bonds, the payment of which is secured by a mortgage prior in lien to these presents, and the principal of said bonds as and when the same shall mature, so that the security of the bonds issued herewith shall at all times be duly maintained and preserved.

II. That having possession, as aforesaid, it shall and
79 will at all times maintain in full quantity, number, and efficiency and keep insured its rolling stock, tools and machinery, buildings, bridges or other structures, erected or to be erected on the premises, and all other property provided for use in connection with the railway herein described, usually insured by railway companies, and in the same manner and to the same extent, and simultaneously with the execution hereof it will furnish to the Trustee a

full and complete inventory or schedule of said rolling stock and equipment.

III. That having possession, as aforesaid, it shall and will diligently preserve all the rights and franchises to it granted and upon it conferred by the acts of Congress, appertaining to the railway property and premises subject to the lien hereof and otherwise, and whenever necessary or advisable comply with the laws of any State wherein the routes aforesaid, or any it may hereafter acquire the right to construct its road on or any part thereof, may now or shall at any time hereafter be situate, in such manner and form as counsel learned in the law shall advise, with a view to effect-
80 ually preserve, obtain or secure the corporate rights and franchises, enabling it to locate, construct, use, operate and maintain the said railway line or lines whereon these presents shall constitute a lien throughout the whole extent thereof, and charge tolls thereon for the transportation of passengers and freights, and that using and operating the said Railway as the same was heretofore constructed, or as the same or any section or part thereof shall hereafter be constructed and completed, ready for use and operation, it shall and will, at all times, maintain, preserve, and keep the same, and every part thereof, with the rolling stock, fixtures, and appurtenances, and every part and parcel thereof, in thorough repair and working order, at least equal to its present condition in respect to the road-bed, ties, and rails, motive power, rolling stock and equipment, and fully supplied with suitable and sufficient motive power, rolling stock, and equip-
81 ment, and shall and will, from time to time, make all needful and proper repairs, renewals and replacements, useful alterations, additions, betterments and improvements, so as to maintain the same in proper order and in complete repair and good working condition, so that the traffic and business of the said road and of every part thereof shall at all times be done with safety and expedition.

* * * * * * *

V. That it shall and will well and truly pay, or cause to be paid, to the holders of the Second Mortgage Bonds to be issued hereunder, as hereinbefore stated, or of such of the said Second Mortgage Bonds as shall from time to time be outstanding and secured hereby, and every one of them, the principal thereof, according to the true intent and meaning thereof, and pay interest on said principal sum up to the rate of five per cent. per annum from December 1st, 1887, payable annually on the first day of March in each year, the first payment, if any, to be due March 1st, 1889, in like gold coin out of the net income of the Railway Company, as the same
82 may be determined by the board of directors of the Railway Company. If the income of the Railway Company applica-

ble for the interest on said bonds shall not, in the judgment of the board of directors, be sufficient to pay the said interest in full, such interest or so much as shall remain unpaid shall not accumulate, and all payments both of principal and interest shall be without deduction from either said principal or interest for any tax or taxes which, by any present or future laws of the United States or the States of Texas and Louisiana, may be payable for or in respect of the said principal or interest for national, State, or municipal purposes; the Railway Company hereby agreeing to pay any such tax or taxes which it may now or hereafter be required by any such law to retain therefrom. 85

And in case of default of such payment by said Texas and Pacific Railway Company, from any cause whatever, the Railway Companies for the consideration in said Second 83 Mortgage Bonds mentioned, further hereby covenant, promise, and agree that they shall not and will not at any time hereafter insist on or plead in any manner whatever, claim or take the benefit or advantage of any stay or extension law, 86 which may now or at any time hereafter be in force, in any locality where the railway property and premises hereby conveyed or intended so to be, or any part thereof, may or shall be situate; or claim, take, or insist on the benefit or advantage to be derived from any law, now or hereafter in force, as aforesaid, providing for the valuation or appraisement of said railway property or premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to the provisions hereinafter contained or the decree of any court of competent jurisdiction; or after any such sale or sales, claim or exercise any right which they may now or hereafter have, by statute enacted by the legislature of the State of Texas or Louisiana, or other State wherein the said Railway property or premises, or any part thereof shall or may be situate, to redeem the property so sold, or any part thereof; and said Railway 84 Companies hereby expressly waive all benefit and advantage that they might or could derive by virtue of any such law or laws and agree not to hinder, delay, or impede the execution by said Trustee of the powers of entry and sale hereinafter 87 conferred upon, granted, and delegated to it, but to suffer and permit the execution of such powers, as if such law or laws had not been made or enacted.

VI. Further, that at all times until said Second Mortgage Bonds, with interest, shall be fully paid, the Railway Company will permit the Trustee, its agents, clerks, or attorneys, for that purpose to be duly authorized, fully to inspect all the books of account of the Railway Company, together with its books, reports, memoranda, or other papers, and to take

such extracts therefrom as may be deemed expedient to fully report thereon, with convenient details. And further, that if at any time the net income of the road hereinbefore conveyed
85 properly applicable to the payment of the interest on the outstanding bonds hereby secured shall be insufficient for such payment, the Railway Company will, without delay, furnish to the Trustee full and detailed accounts and statements of the gross earnings and receipts of said road, and of all the expenses, disbursements, and deductions out of or charged against the same during the period in which there shall be such deficiency.

* * * * * * *

ARTICLE FOUR.—In case default shall be made by said Railway Company on or after March 1st, 1892, in the payment of full interest at the rate of five per cent. per annum on any of the Second Mortgage Bonds which may at any time have been issued and be then outstanding and secured by these presents or in case default shall be made by said Railway Company in the payment of the principal or any of such bonds when and as the same, according to the terms
86 thereof, shall mature; or in case default shall be made by said Railway Company in the payment of any tax, assessment, or other governmental charge lawfully levied and imposed upon the said railway property and premises, or any part thereof, or any other prior lien, and such default shall continue for the period of three months after such tax, assessment, or other governmental charge or lien shall have become due and payable; or in case said Railway Company, shall make default in the due observance and performance of its covenant of further assurance, or any other of its covenants, promises and agreements herein contained, and either of such defaults continue for the period of three months; then and in each and every such case of default continued as aforesaid, on the request of holders of not less than one-third of the bonds outstanding the said Trustee shall personally, or by its agent or agents, attorney or attorneys, enter into and upon all and singular the railway property and premises, lands, rights, interests and franchises hereby conveyed or intended so to be, and each and every part thereof, and exclude the said
87 Railway Company, its agents and servants wholly therefrom, and having and holding the same, use and operate, manage and control said railway, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, and servants or attorneys, to the best advantage of the interests as well of the public as of the holders of Second Mortgage Bonds secured hereby in accordance with law and any statute relating to said railway

or any part thereof, or to the operation thereof; and upon such entry it shall be lawful for the said Trustee from time to time to insure or keep insured, at the expense of the trust estate, the rolling stock, tools and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railway, and whereof it shall become possessed as aforesaid in the same manner and to the same extent as is usual with railway companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and replacements, and useful alterations, additions,
88 betterments, and improvements thereto and thereon, as well in respect of the rolling stock or equipment as in respect of the railway and appurtenances and other subject-matters as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railway and conducting the business thereof and of all repairs, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a just and reasonable compensation for its own services and compensation to all agents, clerks, servants, and other employes by it properly engaged and employed, the said Trustees shall apply the moneys arising as aforesaid, to the payment of the interest which shall be due and payable on the bonds outstanding
89 and secured hereby, in the order in which such interest shall become due, ratably to the persons or parties entitled to receive the same: *Provided, however*, That the holders of a majority of the said bonds may appoint a committee to direct and supervise the management of the property by said Trustee, which committee shall have such powers, control, and supervision, as are or may be conferred upon and exercised by the board of directors of the Railway Company.

ARTICLE FIVE.—There shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured hereby, except in the event of the foreclosure of the first mortgage, but in case default shall be made by the said Company in the payment of the principal of any of the said Second Mortgage Bonds, when the same shall become and be due as therein or hereinbefore provided, and in each such case of default it shall be lawful for the said Trustee, after entry as aforesaid, or other entry, or without any entry, personally or by its attorneys or
90 attorney, agents or agent, to sell and dispose of all and singular the railway property and premises, rights, franchises and interests, lands and appurtenances, hereby conveyed or

intended so to be, or from time to time as they shall deem proper, of so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay the amount due on such bonds then outstanding, for principal and interest, according to the terms thereof, together with the costs and expenses of such sale, and of all right, title and interest, claim and demand whatsoever, benefit, equity or redemption, and statutory right to redeem of the said Company, its successors and assigns, of, in, and to the same, or so much thereof as may be sold, and every part thereof, at public auction at such place in the city of New Orleans, or on the premises or any part thereof, and at such time and upon such terms as may be specified in the notice of sale to be given as hereinafter provided, for the highest and best price the same will bring in cash.

91 Preparatory to such sale the said Trustee shall give notice of the time and place, when and where, and the terms upon which, the same is to be made, and containing a description of the property to be sold, by advertisement thereof in one newspaper at that time published in each of the cities of New Orleans, Philadelphia, and New York, and in the State of Texas, once a week for six successive weeks; and upon any sale or sales under this instrument the said Trustee is hereby empowered to make, execute, and deliver to the purchaser or purchasers at any such sale a good and sufficient deed, or good and sufficient deeds of conveyance, for the railway property and franchises sold. In case of any sale or sales by virtue of any of the provisions of this instrument, the said company hereby expressly and absolutely agrees to waive, and hereby irrevocably waives, the benefit or advantage of any and all valuation, stay, appraisement or extension laws, and any statutory right to redeem, now existing, or which
92 may hereafter be in force in the State or States wherein the property to be sold under this instrument or any part thereof may at the time of the sale be situate, or where the sale may take place, which, but for this provision, agreement and waiver, might be operative, in respect of any such sale, or might be availed of to prevent or postpone an absolute or immediate sale under the provisions of this instrument, or to redeem after any sale the property sold thereat, or any part thereof; and it is likewise expressly declared that any sale or sales made by said Trustee, under or by virtue of this instrument, when completed, shall operate to divest all title, rights and interest, claims and demands whatsoever both at law and in equity of said Railway Companies of, in, and to the rights, property, powers, privileges, and franchises sold, and shall be a perpetual bar both at law and in equity against the said

Railway Companies, their successors and assigns, and any and all persons whomsoever claiming or to claim the rail-
road property, rights, powers, privileges, and franchises sold,
93 or any part or parcel thereof, by, from, through, or under the said Railway Companies, its successors and assigns, or any of them. And the said Trustee shall apply the proceeds or avails of any sale to be made under the provisions of this instrument, and the purchase money paid thereon, after deducting therefrom just allowances for all expenses connected therewith, including attorney and counsel fees, as well as any and all advances, expenses and liabilities which may have been made or incurred by said Trustee in using, operating, maintaining, and preserving said railroad property and premises, or in carrying on and managing the business for the period the same may have been in the said Trustee's possession, or in arranging for making and completing the sale and payments for taxes, assessments, or other charges or liens prior to the lien of these presents, if any such there shall then be, and the said railway property and premises, or any part thereof, shall not have been sold subject thereto, as well as just and reasonable compensation for the said Trustee's own services, to the payment
94 of the principal of such of said bonds as may be at that time outstanding, and of the interest which shall have accrued upon the said principal up to that time, according to the tenor thereof, without discrimination or preference as between principal and interest, but ratably, to the aggregate amount of such principal and accrued interest; it being understood and hereby declared and agreed, that such payment shall be made to the persons holding the bonds evidencing the right to such principal and interest, without discrimination or preference between them on account of the time of the actual issue of said bonds, and, if after payment in full of all the said bonds, principal and interest, a surplus of the said proceeds of sale shall remain, the said Trustee shall pay over such surplus to the said Railway Company, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

And it is hereby declared and agreed that the said
95 Trustee may, from time to time, adjourn any sale to be made under the provisions of this instrument, by announcement made at the time and place appointed for such sale, and if so adjourning such sale, may make the same at the time and place to which the same shall be so adjourned, and without further notice thereof.

And it is further declared and agreed that the receipt of the Trustee shall be a sufficient discharge to the purchaser or purchasers of the property, which shall be sold as aforesaid for his or their purchase money, and that such pur-

chaser or purchasers, his or their heirs, executors, or administrators, shall not, after paying such purchase money and receiving such receipt, be liable to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication, or non-application of any such purchase-money, or any part thereof.

96 And it is further agreed that no part of the premises hereby mortgaged or intended so to be shall be sold under proceedings at law, by the holder or holders of all or any of the bonds intended to be hereby secured, it being the intention and agreement of the parties for the better securing the largest possible price for the mortgaged premises in the event of a sale thereof, that the same shall only be sold in the manner herein provided or under proper proceedings in a Court of Equity for the foreclosure of this mortgage.

97 ARTICLE SIX.—It is hereby mutually agreed, that at any public sale of the railway property, premises, rights, privileges, and franchises hereinbefore conveyed, made by virtue of the powers herein granted, or by judicial authority, for the purpose of enforcing the lien of these presents, the Trustee, under these presents for the time being may, in its discretion and not otherwise, bid for, and if the same be obtainable at the price hereafter mentioned, purchase and acquire the property so offered for sale, in behalf of all the holders of bonds secured by this instrument, which shall then be outstanding, in proportion to the amount of said bonds by them respectively held: *Provided, however*, That nothing herein contained shall authorize the said Trustee to bid, on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon, according to the tenor thereof, and the costs and expenses of such sale for the entire property then held upon the trusts of this indenture, or any amount

98 reasonably proportionate thereto, for any part of said property.

And it is further agreed, that the Second Mortgage Bonds shall be received in payment of the purchase-money of any property sold by virtue hereof, as equivalent to so much cash of the said purchase-money as would be distributed and payable thereon.

ARTICLE SEVEN.—Upon the filing of a bill in equity or other commencement of judicial proceedings to enforce the rights of the Trustee and of the bondholders under these presents, the said Trustee shall be entitled to exercise the right of entry herein conferred, or to the appointment by any court of competent jurisdiction of a receiver or receivers of the property hereby mortgaged, or of the earnings, rev-

enue, rents, issues, or profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

* * * * * * *

99 ARTICLE ELEVEN:—If the said company shall well and truly pay or cause to be paid all bonds to be issued under or entitled to the protection of this deed of trust, and the coupons attached thereto, at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of these presents, then, and in that case, all property, rights and interests hereby conveyed shall revert to the said Company, and the estate, right, title and interest of the said Trustee aforesaid, shall thereupn cease, determine, and become void; otherwise the same shall be, continue, and remain in full force and virtue."

* * * * * * *

100 XXI. Your orator is informed and believes and therefore alleges that subsequently to the first day of December, 1887 (the date from which interest on the Income Bonds commenced to accrue), and prior to the date of the filing of this bill, the defendant Texas Company received during each annual interest period of the Income Bonds ended December first, large amounts of income remaining after the payment of its total operating expenses, the exact amounts of which are unknown to your orator; that in the annual reports of the Board of Directors of the defendant Texas Company
101 to the Stockholders of the defendant Texas Company such income remaining after the payment of all operating expenses is shown for annual periods ended December 31 for the years 1888 to 1911, both inclusive, and for annual periods ended June 30 for the years 1911–1915, inclusive; that the amounts of such income so remaining for said several periods as shown by said annual reports are as follows :

	Year Ended December 31, 1888	$ 1,576,866.21
	Year Ended December 31, 1889	2,023,769.85
	Year Ended December 31, 1890	1,806,521.93
	Year Ended December 31, 1891	1,797,020.30
102	Year Ended December 31, 1892	1,618,677.61
	Year Ended December 31, 1893	2,234,140.22
	Year Ended December 31, 1894	2,134,593.19
	Year Ended December 31, 1895	1,913,195.48
	Year Ended December 31, 1896	1,777,183.01
	Year Ended December 31, 1897	2,324,837.86
	Year Ended December 31, 1898	2,515,712.29
	Year Ended December 31, 1899	2,581,894.86
	Year Ended December 31, 1900	3,358,667.93
	Year Ended December 31, 1901	4,098,626.29
	Year Ended December 31, 1902	3,632,141.39
	Year Ended December 31, 1903	3,980,123.58
	Year Ended December 31, 1904	4,383,199.21
	Year Ended December 31, 1905	4,504,387.29
	Year Ended December 31, 1906	5,115,702.46
	Year Ended December 31, 1907	5,204,280.91
	Year Ended December 31, 1908	3,756,324.94
	Year Ended December 31, 1909	4,109,568.39
	Year Ended December 31, 1910	4,210,024.06
	Year Ended December 31, 1911	4,141,739.04
103	Year Ended June 30, 1912	3,828,117.74
	Year Ended June 30, 1913	3,443,912.17
	Year Ended June 30, 1914	4,525,002.55
	Year Ended June 30, 1915	4,371,122.71
	* Total	$90,967,353.47

that from December 1, 1887, to December 1, 1915, the amount of income so remaining received by the defendant Texas Company during each annual interest period ended December 1 was equal to or in excess of the amount shown in the above tabulation as received by the defendant Texas Company during the annual period ended December 31 or June 30, as the case may be, of the same calendar
104 year; and that since December 1, 1915, and prior to the date of the filing of this bill the defendant Texas Company has received a large amount of income remaining after the payment of all operating expenses, the exact amount of which is unknown to your orator.

---

* From this amount should be deducted the amount of income so remaining received for the six months from July 1 to December 31, 1911, which is shown twice in the above tabulation.

XXII. That subsequently to the execution and delivery of the Second Mortgage and prior to the date of the filing of this bill no interest was paid to the holders of any of the Income Bonds except as follows:

Date of Payment	Out of Net Income for Year Ended	Per Cent. on Outstanding Bonds	Amount
March 1, 1900	Dec. 1, 1899	1½%	$ 375,000.00
March 1, 1901	Dec. 1, 1900	4%	929,520.00
March 1, 1902	Dec. 1, 1901	5%	1,161,900.00
March 1, 1903	Dec. 1, 1902	5%	1,161,900.00
March 1, 1904	Dec. 1, 1903	5%	1,233,806.25
March 1, 1905	Dec. 1, 1904	5%	1,233,806.25
March 1, 1906	Dec. 1, 1905	5%	1,233,806.25
March 1, 1907	Dec. 1, 1906	5%	1,233,806.25
March 1, 1908	Dec. 1, 1907	3½%	863,664.00
Total			$9,427,209.00

XXIII. Your orator is informed and believes and therefore alleges that at the expiration of each of said annual interest periods of the Income Bonds for the years mentioned below there remained in the possession of the defendant Texas Company out of said income after payment of all expenditures charged thereagainst, a surplus consisting of large sums of money, the exact amount of which is unknown to your orator; that in said annual reports of the Board of Directors of the defendant Texas Company is shown the amount of said surplus remaining in the possession of the defendant Texas Company at the expiration of each annual period ended December 31 for the years mentioned below prior to and including the year ended December 31, 1911, and of each annual period ended June 30 for the years thereafter mentioned below; that the respective amounts of said surplus for said annual periods shown by said annual reports are as follows:

Year Ended December 31, 1888	$ 182,724.93
Year Ended December 31, 1889	287,334.32
Year Ended December 31, 1891	33,019.80
Year Ended December 31, 1893	527,097.43
Year Ended December 31, 1894	268,335.94
Year Ended December 31, 1895	154,971.83
Year Ended December 31, 1897	447,969.15
Year Ended December 31, 1898	31,152.64
Year Ended December 31, 1899	446,982.84
Year Ended December 31, 1900	1,137,277.70
108 Year Ended December 31, 1901	1,486,977.41
Year Ended December 31, 1902	1,718,102.30
Year Ended December 31, 1903	938,722.33
Year Ended December 31, 1904	1,158,739.43
Year Ended December 31, 1905	1,203,042.51
Year Ended December 31, 1906	1,564,243.17
Year Ended December 31, 1907	603,813.74
Year Ended December 31, 1908	265,014.98
Year Ended December 31, 1909	688,362.76
Year Ended December 31, 1910	447,378.06
Year Ended December 31, 1911	186,975.65
Year Ended June 30, 1914	377,778.55
Year Ended June 30, 1915	252,052.57
	$14,408,070.04;

that on the first day of December preceding each 31st day of December or succeeding each 30th day of June, as the case may be, in this paragraph XXIII above mentioned, there remained in the possession of the defendant Texas Company a surplus, computed by
109 making like deductions as are made in such annual report for the corresponding year, equal to or in excess of the surplus reported as aforesaid for the year ended on the 31st day of December or the 30th day of June of such year, as the case may be; that for none of said years ended December 1 was any payment made to any of the holders of the Income Bonds other than the amounts aggregating $9,427,209.00 specified in paragraph XXII hereof; and that, excepting (*a*) the sums of $375,000 and $929,520 out of such surpluses in respect of the years ended December 31, 1899 and December 31, 1900, said sums respectively having been paid as interest out of net income for the years ended December 1,

110 1899, and December 1, 1900, as aforesaid, and (*b*) said surpluses for the years ended December 31, 1901 to 1907, both inclusive, full interest at the rate of five per cent. per annum having been paid on the Income Bonds for the years ended December 1, 1901 to 1906, both inclusive, and interest in excess of such surplus shown by said annual reports for the year ended December 31, 1907, having been paid on the Income Bonds out of net income for the year ended December 1, 1907, and (*c*) said surplus of $252,052.57 shown for the year ended June 30, 1915, the aggregate amounts of surpluses shown as aforesaid for the several
111 years in this paragraph XXIII above specified ended December 31 or June 30, as the case may be, amounted to $4,177,856.58, and that the aggregate amount of such surpluses, with like exceptions, for the annual interest periods ended December 1 in the calendar years mentioned in this paragraph was equal to, or in excess of, said sum of $4,177,856.58.

XXIV. Your orator is informed and believes and therefore alleges that all of said surplus sums aggregating $4,177,856.58 hereinabove in paragraph XXIII hereof mentioned were and are properly applicable to the payment of interest on the Income Bonds in accordance with the terms of the Second Mortgage ; that no part of
112 said surplus sums has been applied to the payment of the interest on the Income Bonds, and that the Board of Directors of the defendant Texas Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds neglected and refused to determine that said surplus sums were net income applicable to the payment of interest on the Income Bonds, and wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds determined that said surplus sums were not net income so applicable.

113 XXV. Your orator is informed and believes and therefore alleges that subsequently to December 1, 1887, the defendant Texas Company paid out of its income remaining after payment of all operating expenses interest at the rate of five per cent. per annum upon its First Mortgage Bonds outstanding under and secured by the First Mortgage of the defendant Texas Company and the defendant New Orleans Company dated February 1, 1888, made to The Fidelity Insurance, Trust and Safe Deposit Company, Trustee, (under which mortgage approximately $25,000,000 principal amount of such First Mortgage Bonds have been certified and issued and
114 are now outstanding) and interest at the rate of six per cent. per annum upon its bonds outstanding under the mortgage on its

Eastern Division in said First Mortgage referred to, and interest at the rate of six per cent. per annum upon the School Fund Loan in said First Mortgage referred to; that the aggregate principal amount of its bonds outstanding under said First Mortgage and under said mortgage on its Eastern Division, together with the principal amount of said School Fund Loan, has at no time exceeded $25,000,000; that the aggregate principal amount of bonds secured by said mortgage on its Eastern Division has at no time since December 1, 1887, exceeded $3,784,000; that the aggregate principal amount of said School Fund Loan has at no time
115 since December 1, 1887, exceeded $167,000; that all except $2,000 principal amount of said bonds secured by said mortgage on its Eastern Division were paid and cancelled prior to December 31, 1905; that said School Fund Loan was paid on or before December 31, 1898; that no bonds were outstanding between December 1, 1887, and December 31, 1898, either issued or assumed by the defendant Texas Company in accordance with the right reserved by it under the paragraph immediately following the *habendum* of the Second Mortgage to issue or assume bonds of certain classes at a rate not exceeding $12,500 a mile and at a
116 rate of interest not exceeding five per cent. per annum, and that the maximum principal amount of bonds so issued or assumed by the defendant Texas Company and outstanding at any time since December 31, 1898, has not exceeded and does not exceed $4,970,000; that the maximum annual interest charge upon all the issues of bonds in this paragraph XXV mentioned, other than the Income Bonds, did not at any time prior to December 31, 1898, exceed $1,289,510, and that the maximum annual interest charge on such bonds other than the Income Bonds has not at any time since December 31, 1898, exceeded $1,538,010; and
117 that since December 1, 1887, the defendant Texas Company has paid large sums for taxes on the property covered by the Second Mortgage, the exact amount of which is unknown to your orator. Your orator is informed and believes and therefore alleges that in addition to the sums specified as surplus in paragraphs XXIII and XXIV hereof, the entire income of the defendant Texas Company remaining after payment of its operating expenses and of all interest payable on the bonds other than Income Bonds hereinbefore in this paragraph mentioned, and of all taxes upon the property subject to the lien of the Second Mortgage, was and is properly applicable to the payment of interest on the Income Bonds up to the rate of five

per cent. per annum; that the income so remaining has not been so applied or paid but has been expended by the defendant Texas Company for purposes and in amounts unknown to your orator but including the purposes, and in amounts equal to or exceeding the amounts, specified in the extracts from the annual reports of the defendant Texas Company of which a compilation is hereto attached marked Exhibit B and made a part hereof; that included among said purposes are the following: interest on funded debt, interest on unfunded debt, interest and discount on current indebtedness, taxes, additions and betterments to property and equipment and new property and new equipment, representing capital expenditures, liquidation of debts and obligations incurred prior to the execution of the Second Mortgage; that except as to the amounts payable for interest on the bonds, other than the Income Bonds, in this paragraph mentioned, and for taxes upon property subject to the lien of the Second Mortgage, such expenditure constituted wrongful diversions and misapplications of net income of the defendant Texas Company applicable up to the rate of five per cent. per annum to the payment of the interest on the Income Bonds, and was in violation of the rights of your orator and of the holders of the Income Bonds; that the Board of Directors of the defendant Texas Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds neglected and refused to determine that said amounts of income so diverted and misapplied were net income applicable to the payment of interest on the Income Bonds, and wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds determined that said income so diverted and misapplied was not net income applicable to the payment of the interest on the Income Bonds.

XXVI. Your orator is informed and believes and therefore alleges that the defendant Railway Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds neglected and refused to pay the interest due and payable out of its net income (as the term "net income" is defined in the Second Mortgage) upon the Income Bonds at the times and place at which said interest became due, except as aforesaid; that the defendant Texas Company neglected and refused to apply said surplus sums aggregating $4,177,856.58 computed as hereinabove in paragraph XXIV described to the payment of the interest on the Income Bonds; that the defendant Texas Company as hereinabove alleged further wrongfully diverted and

misapplied its net income (as so defined) to an amount unknown to your orator but which as hereinabove alleged is shown in the annual reports of the defendant Texas Company and by said Exhibit B to have been amply sufficient to pay large amounts by way of interest on the Income Bonds in excess of
123 the amounts so paid as hereinbefore stated; and that the Board of Directors of the defendant Texas Company wrongfully and in violation of the rights of your orator and of the holders of the Income Bonds annually during the period subsequent to the execution of the Second Mortgage and prior to the filing of this bill neglected and refused to determine (except as to the amounts paid as hereinabove stated) that such surplus sums and the amounts so diverted constituted net income received by the defendant Texas Company applicable to the payment of the interest on the Income Bonds.

XXVII. That the defendant Texas Company did not make payment on the dates specified below of interest in the amounts specified below and payable out of the net income (as defined in the Second Mortgage) of the defendant Texas Company upon the re-
124 spective principal amounts of Income Bonds then outstanding and stated below, to wit:

Dates	Principal Amounts of Bonds Outstanding	Per Cent. of Interest Not Paid	Amounts of Interest Not Paid
March 1, 1889	$23,207,000.00	5%	$1,160,350.00
March 1, 1890	24,908,143.18	5%	1,245,407.16
March 1, 1891	24,913,580.68	5%	1,245,679.03
March 1, 1892	24,918,931.93	5%	1,245,946.60
March 1, 1893	24,920,953.68	5%	1,246,047.68
March 1, 1894	24,920,953.68	5%	1,246,047.68
March 1, 1895	24,935,117.71	5%	1,246,755.88
March 1, 1896	24,935,545.21	5%	1,246,777.26
March 1, 1897	24,935,587.96	5%	1,246,779.40
125 March 1, 1898	24,935,587.96	5%	1,246,779.40
March 1, 1899	24,935,587.96	5%	1,246,779.40
March 1, 1900	24,973,900.11	3½%	874,086.50
March 1, 1901	24,979,300.11	1 %	249,793.00
March 1, 1908	25,000,000.00	1½%	375,000.00
March 1, 1909	25,000,000.00	5 %	1,250,000.00
March 1, 1910	25,000,000.00	5 %	1,250,000.00
March 1, 1911	25,000,000.00	5 %	1,250,000.00
March 1, 1912	25,000,000.00	5 %	1,250,000.00
March 1, 1913	25,000,000.00	5 %	1,250,000.00
March 1, 1914	25,000,000.00	5 %	1,250,000.00
March 1, 1915	25,000,000.00	5 %	1,250,000.00
Total			$23,872,228.99

That by reason of the failure and refusal of the defendant Texas Company to apply the surplus sums aggregating, or in excess of, the amount of $4,177,856.58 hereinabove mentioned in paragraphs XXIII and XXIV hereof, and more particularly specified below, to
126 the payment of interest on the Income Bonds, default was made by the defendant Texas Company in the payment on the dates specified below of interest in the amounts or in excess of the amounts specified below and due and payable (together with further interest up to the rate of five per cent. per annum) upon the respective principal amounts of Income Bonds then outstanding and hereinabove in this paragraph stated, to-wit:

126*a*

Date	Surplus Remaining Above All Expenditures Charged Thereagainst After Deducting Interest Actually Paid on the Income Bonds, at Expiration of Annual Interest Period Ended Dec. 1st of Preceding Year	Amounts of Interest Defaulted
March 1, 1889	$182,724.93	$182,724.93
March 1, 1890	287,334.32	287,334.32
March 1, 1892	33,019.80	33,019.80
March 1, 1894	527,097.43	527,097.43
March 1, 1895	268,335.94	268,335.94
March 1, 1896	154,971.83	154,971.83
March 1, 1898	447,969.15	447,969.15
March 1, 1899	31,152.64	31,152.64
March 1, 1900	71,982.84	71,982.84
March 1, 1901	207,757.70	207,757.70
March 1, 1909	265,014.98	265,014.98
March 1, 1910	688,362.76	688,362.76
March 1, 1911	447,378.06	447,378.06
126*b* March 1, 1912	186,975.65	186,975.65
March 1, 1915	377,778.55	377,778.55
Total----	$4,177,856.58	$4,177,856.58;

and that such default still continues. That by reason of the failure and refusal of the defendant Texas Company to apply to the payment of interest on the Income Bonds, the amounts of its net in-
126*c* come applicable thereto and diverted as hereinabove alleged in paragraphs XXV and XXVI hereof, further default was made by the defendant Texas Company on the dates specified above as the due dates of the instalments of interest on the Income Bonds which

127 remain unpaid, in amounts unknown to your orator but which, as your orator is informed and believes, are equal to or in excess of the amounts set forth in Exhibit B hereto annexed and alleged in paragraphs XXV and XXVI hereof to have been diverted out of the income of the defendant Texas Company during the respective annual interest periods immediately preceding said respective due dates. Your orator is informed and believes and therefore alleges that, excepting as to the $9,427,209 interest heretofore paid as above stated, the defendant Texas Company has at no time provided any funds at the dates or at the place where interest was due and payable upon the Income Bonds in accordance with the terms thereof and of the Second Mortgage, nor provided elsewhere any funds with which to pay any part of such interest, and on or prior to the due dates of the respective instalments of interest thereon the holders of substantially all of the Income Bonds were informed that the defendant Texas Company
128 had not and would not have any such funds at such place or elsewhere for the purpose of paying such interest, and were informed that the Board of Directors of the defendant Texas Company had neglected and failed to determine that the defendant Texas Company had received net income available for or applicable to such payments, and were informed that said Board had determined that the defendant Texas Company had received no net income so applicable ; that the facts relative to the existence of such net income were peculiarly within the knowledge of the defendant Texas Company and its Board of Directors ; that
129 St. Louis, Iron Mountain and Southern Railway Company, a corporation of Missouri and Arkansas, owns $23,703,000 principal amount of the Income Bonds subject to the pledge thereof under its mortgage known as its Unifying and Refunding Mortgage ; that said St. Louis, Iron Mountain and Southern Railway Company for upwards of fourteen years has owned subject to such pledge more than $22,000,000 principal amount of said bonds ; that
130 all or nearly all of the remainder of the Income Bonds have for many years been owned by officers, directors and holders of large amounts of stock of the defendant Texas Company ; that from and after December 1, 1887, the date from which interest commenced to accrue upon the Income Bonds, a considerable number of the officers and directors of the defendant Texas Company have at all times until March, 1915, been officers and directors of said St. Louis, Iron Mountain and Southern Railway Company ; that during

all the time of the ownership of the Income Bonds by said St. Louis, Iron Mountain and Southern Railway Company as hereinbefore alleged and until March, 1915, the dominant management and
130a control of said St. Louis, Iron Mountain and Southern Railway Company and of the defendant Texas Company have been possessed and exercised by the same persons or group of persons; that by reason of the identity of the interests in control of said two companies, said St. Louis, Iron Mountain and Southern Railway Company took no action to enforce, nor did it request your orator or its predecessor in the trust to enforce its rights or the rights of the Trustee under the Income Bonds and the Second Mortgage and that this bill was not brought earlier for such reason; that said
131 St. Louis, Iron Mountain and Southern Railway Company is insolvent and its properties have been placed in the hands of a receiver and proceedings have been commenced for the foreclosure of its mortgage known as its First and Refunding Mortgage, and that the bonds secured by said mortgage, aggregating more than $29,000,000 principal amount, have been declared due and payable, and that said St. Louis, Iron Mountain and Southern Railway Company is without means wherewith to pay the same; that the receiver of the properties of said St. Louis, Iron Mountain and Southern
132 Railway Company, the owner of more than 94 per cent. of the Income Bonds, has requested your orator to bring suit for the foreclosure of the Second Mortgage and the enforcement of the rights of your orator and of the holders of the Income Bonds; and that no part of said sums of interest in default hereinabove specified in this paragraph XXVII hereof, has been paid by the defendant Texas Company or by any other person in its behalf and that the whole of said sums remain due, owing and unpaid.

XXVII A. Under the provisions of the Income Bonds and the Second Mortgage the defendant Texas Company was and is charged and expressly entrusted with the duty of applying each year its net income to the payment of the interest accruing on the Income Bonds in said mortgage described up to the rate of five per cent.
132a per annum, and in and by the Income Bonds and the Second Mortgage the defendant Texas Company undertook to perform said duty. But except as hereinbefore alleged, the defendant Texas Company has failed to perform the duty so charged upon and expressly entrusted to it, and has diverted portions of its net income to purposes other than the payment of interest on the Income Bonds, and

by reason of such diversion of its net income has failed to pay interest upon the Income Bonds as hereinbefore alleged in paragraph XXVII hereof.

133 XXVIII. That by reason of the wrongful diversion of net income and the default of the defendant Texas Company as aforesaid, the defendant Texas Company should account to your orator for the amount of its net income applicable to the payment of the interest on the Income Bonds and diverted as aforesaid; and your orator is informed and believes and therefore alleges that it is entitled by the terms of the Second Mortgage to exercise the right of entry therein conferred and also any and all other rights and powers
134 therein conferred and provided by it to be exercised and to the appointment of a receiver or receivers of the mortgaged premises and of the earnings, revenue, rents, issues and profits thereof.

XXIX. Your orator is informed and believes, and therefore alleges that the defendant Texas Company has oustanding more than three million four hundred thousand dollars ($3,400,000) principal amount of its promissory notes, which matured on the first day of June, 1915; that on or after said date said notes were duly presented for payment to the defendant Texas Company and that
135 the defendant Texas Company has neglected and refused to pay to the holders thereof the principal of said notes or any part thereof, although said principal is admitted by the defendant Texas Company to be due and payable by it, and that the defendant Texas Company at all times since the said first day of June, 1915, has been and still continues to be in default in the payment of the principal of said notes and has been and is without means to pay the same.

XXX. Your orator is informed and believes, and therefore alleges that the defendant Texas Company and said St. Louis, Iron
136 Mountain and Southern Railway Company are the owners in equal proportions of substantially the entire capital stock of Trans-Mississippi Terminal Company (a Louisiana corporation formed to construct and own railways and railway terminals near New Orleans, Louisiana); that the construction of said railways and railway terminals is now in progress and has heretofore been financed by the issuance of notes of Trans-Mississippi Terminal Company aggregating $6,000,000 principal amount secured by the pledge of its bonds aggregating $7,500,000 face amount; that said notes and
137 bonds have heretofore been jointly and severally guaranteed by the defendant Texas Company and said St. Louis, Iron Mountain

and Southern Railway Company; that the entire authorized issue of such notes and of such bonds respectively have been sold and pledged and the entire proceeds of the notes so sold have been or shortly will be expended; that the defendant Texas Company has heretofore agreed with said St. Louis, Iron Mountain and Southern Railway Company to furnish one-half of all additional moneys which may be required to complete said railways and railway terminals and that said Trans-Mississippi Terminal Company
138 is wholly without the means and wholly unable to procure the means necessary to complete the construction of its said railways and railway terminals; and your orator is informed and believes and therefore alleges that said St. Louis, Iron Mountain and Southern Railway Company is wholly and completely insolvent, and that said St. Louis, Iron Mountain and Southern Railway Company is and will be wholly unable to provide or procure to be provided the funds requisite for the completion of said railways and railway terminals; that in view of the completion of the Panama Canal, the use of said railways and railway terminals
139 as an outlet and feeder for the traffic of the defendant Texas Company through the port of New Orleans is essential to the operation of the lines of railway of the defendant Texas Company; that the completion of said railways and railway terminals is necessary to preserve the defendant Texas Company from threatened loss of its large investments heretofore made in the stock and other securities of said Trans-Mississippi Terminal Company, and from said guaranties heretofore placed upon its notes and bonds;
140 and that the defendant Texas Company is and will be wholly unable to provide or procure to be provided the funds necessary for the completion of said railways and railway terminals.

XXXI. Your orator is informed and believes and therefore alleges that the defendant Texas Company has outstanding a floating indebtedness in a substantial amount for materials and supplies furnished to date and for operating expenses, much of which is now overdue, and that the defendant Texas Company is unable
1 to pay the same; that the defendant Texas Company is and will be without collateral security or other means adequate and available
141 to effect loans for the purpose of meeting such obligations, and is without means adequate and available to meet its immediate and pressing needs in operating its system; that there is grave danger that some of the creditors holding said floating indebtedness may bring suits in respect thereof and may levy execution on the lines

of railway now owned by the defendant Texas Company and on the equipment, materials and supplies and other property of the defendant Texas Company on hand and kept by the defendant Texas Company for necessary use in operating its lines of railway and that the lines of railway of the defendant Texas Company may no longer be operated as a single system but be broken up and separately operated,
142 that it is essential to the interests of the defendant Texas Company and to the interests of the public and of your orator and of the holders of the Income Bonds that the property of the defendant Texas Company should not be sacrificed or dismembered ; that the only means whereby the defendant Texas Company will be able to pay its floating indebtedness and discharge its obligations and to pay the interest upon the Income Bonds is by the continued maintenance and operation of its system and railways as a whole, and
143 by an uninterrupted use thereof ; that any suits or process against its property or its revenue would seriously embarrass and cripple it and destroy its power successfully to operate said system together with its appurtenances ; that unless some definite action is taken so that the operation of its system shall be kept intact, great and severe loss will be inflicted on the public, on your orator and on the holders of the Income Bonds of the defendant Texas Company.

XXXII. Your orator is informed and believes, and therefore
144 alleges that the income and revenues of the defendant Texas Company are and will be wholly insufficient to pay and discharge the indebtedness of the defendant Texas Company now due and owing by it, and the defendant Texas Company has no resources with which to provide for the payment of said indebtedness and is insolvent.

XXXIII. Your orator is informed and believes and therefore alleges that said railroads, property, premises and franchises covered by the Second Mortgage (Exhibit A annexed hereto) constitute one single property which is an instrument and highway of commerce among the several States consisting
145 of a railway and its appurtenances and should be conducted as a single enterprise ; that it is for the interest of all the parties that said railroads, property, premises, and franchises be sold as an entirety in one lot or parcel, and that the value of such property in portions or sections is and will be much less than its value as a whole, and that said mortgaged property, premises and franchises are so constituted that the

same cannot be sold in separate lots and parcels without great and irreparable loss and sacrifice.

XXXIV. That by reason of the matters and things hereinbefore alleged, there is due and payable to your orator as Trustee under the Second Mortgage and to the holders of the Income
146 Bonds, the whole amount of said interest on the Income Bonds which has not been paid by the defendant Texas Company as hereinbefore alleged in paragraph XXVII hereof, aggregating the sum of $23,872,228.99 or such part thereof as should have been paid out of the net income received by the defendant Texas Company applicable to the payment of interest on the entire amount of the Income Bonds issued and outstanding, consisting of said surplus sums hereinabove mentioned in Paragraphs XXIII, XXIV and XXVII hereof, aggregating an amount equal to or in excess of, the amount of $4,177,856.58 and
147 further large amounts diverted by the defendant Texas Company as hereinbefore alleged in Paragraphs XXV and XXVI hereof, the exact amounts of which are unknown to your orator, but which, as your orator is informed and believes and therefore alleges, are equal to or in excess of the amounts shown in the compilation aforesaid, Exhibit B hereto annexed; together with interest thereon from the respective due dates of the instalments of such interest to the payment of which respectively said net income should have been applied; and that no proceedings have been had in law or in equity for the collection or enforcement of said mortgage debt or any part thereof, save only this suit; that your orator has no adequate relief in law and that the relief to which it is entitled can be granted only by a court of equity.

148 XXXV. That by reason of the premises your orator, as Trustee of the Second Mortgage of the defendant Texas Company and the defendant New Orleans Company, is unable adequately to execute its said trust in the manner specified and provided in and by the Second Mortgage without the aid and interposition of this Honorable Court sitting in equity, nor can said trust be executed, as your orator is advised and charges, and the rights of all the parties in interest be ascertained and fully protected, otherwise than by an accounting of the defendant Texas Company for the amount of net income applicable to the payment of said interest and diverted as
149 aforesaid, by the declaration of a lien for such amount by this Honorable Court upon said railroad property and premises, and by a judicial sale of all the property, premises and franchises covered by and embraced in the Second Mortgage.

XXXVI. That this is a suit of a civil nature in equity and the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of Five thousand dollars ($5,000) and arises under the Constitution and laws of the United States; and that this suit
150 is commenced to enforce a legal or equitable lien upon and claim to railroads and property which are in a large part situated in said Northern District of the State of Texas.

WHEREFORE your orator prays:

I. That the defendant Texas Company be required to account to your orator for the net income which has accrued to and been received by the defendant Texas Company subsequently to December 1, 1887, and prior to the date of the filing of this bill applicable to the payment of interest on the Income Bonds other than the interest which has been paid as aforesaid. That upon the determination of the amount of such net income applicable to the payment of said interest as aforesaid, said amount, together with the amount of interest due and payable upon such interest may be decreed by this Honorable Court to be a valid and subsisting lien upon all of the railroads and property (real and personal), rights, privileges and franchises
151 in the Second Mortgage described or thereby conveyed or transferred or intended so to be, or which have become subject to the lien thereof; that the nature, extent and character of said property and premises be ascertained and determined; that the defendant Texas Company may be decreed to pay unto your orator for the use and benefit of the holders of the Income Bonds the amount of said interest so defaulted and interest thereon, and all moneys now due and to become due and payable under and by virtue of the Second Mortgage so executed to said The Mercantile Trust
152 Company, as aforesaid, together with a sum sufficient to pay the costs of this action within a short day to be fixed by the Court; and that in default thereof the defendant Texas Company and the defendant New Orleans Company, and all persons claiming by, through or under them, or either of them, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to said mortgaged property and premises and every part and parcel thereof; and that all and singular said mortgaged property and premises, with the appurtenances, rights,
153 immunities and franchises in the Second Mortgage described and thereby conveyed or so intended to be, or now held thereunder, may be sold as an entirety and in one lot or parcel under a decree of this Honorable Court, and that the moneys aris-

ing from such sale, after deduction has been made from the proceeds of any such sale of the costs, expenses, fees and other charges of the same and a reasonable compensation to your orator, as Trustee, its agents and attorneys, and all other expenses incurred in the premises, and all payments which may be made for taxes, assessments or liens prior to the lien of the Second Mortgage, except any taxes, assessments or other
154 superior liens subject to which such sale shall be made, may be applied to the payment of the whole amount at that time unpaid upon said $25,000,000 principal amount of the Income Bonds for principal whether or not the same previously shall have become due, and for interest, with interest upon overdue instalments of interest and if there shall be any surplus after making such payments, that the same may be applied in such manner as this Honorable Court may direct; and if there shall be any deficiency after
155 making said payments, that your orator may have judgment against the defendant Texas Company for the amount of such deficiency.

2. That a Receiver may be appointed by this Honorable Court of all and singular the railroads, rolling stock, franchises, rights, interests, property and premises of every kind and description and wheresoever located, belonging to the defendant Texas Company and the defendant New Orleans Company and covered by and embraced in the Second Mortgage to said The Mercantile Trust Company, as Trustee, together with the rents, issues, profits, revenues and
156 income thereof, with the usual powers of receivers in such cases and with full power and authority to take possession of the railroads, rolling stock and all other property (real or personal) embraced in and covered by the Second Mortgage and to operate the same and collect and receive the income and tolls thereof, and to apply the same under the order and decree of this Honorable Court; and that the defendant Texas Company and the defendant New Orleans Company be decreed to make such transfers or conveyances to said receiver appointed as herein provided as may be necessary or proper to put said receiver in possession of said railroad and other property, and to the purchaser and purchasers at
157 any sale or sales of all or any part of said property which may be made in conformity with the provisions of the Second Mortgage or under the decree of this Honorable Court as may be necessary or proper to put such purchaser or purchasers or either of them in possession of the property purchased.

3. That a writ of injunction may be issued out of and under the seal of this Honorable Court by one of your Honors, according to

the statute in such cases made and provided, directing, commanding, enjoining and restraining the defendant Texas Company, its
158 successors, agents and employees and all other persons, firms and corporations whatsoever and wheresoever located, situated or domiciled, from diverting or misapplying the net income of the defendant Texas Company applicable to the payment of the interest on the Income Bonds, and from interfering with, transferring, selling or disposing of, attaching, levying upon or in any manner whatsoever disturbing any part of the property embraced in the Second Mortgage now or hereafter in the possession of this Honorable Court or now or hereafter in the possession of any receiver appointed in this cause.

159 4. That your Honors may grant unto your orator a writ of subpoena, directed to the defendant Texas Railway Company and the defendant New Orleans Company, thereby commanding the said defendants and each of them, at a certain time and under a certain penalty therein to be named, personally to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being expressly waived) all and singular the matters and charges aforesaid, and as fully and in every
160 respect as if the same were here again repeated and said defendants and each of them thereunto particularly interrogated, and to stand to and abide by and perform such orders, directions or decrees as shall be made herein and as to your Honor shall seem equitable and just.

5. That your orator may have such other and further relief in the premises as the nature and circumstances of this cause may require and as to this Honorable Court may seem meet.

And your orator, as in duty bound, will ever pray.

BANKERS TRUST COMPANY,
by F. N. B. CLOSE
Vice-President.

(Corporate Seal)

Attest:

161 GUY RICHARDS
Asst. Secretary.

LOCKE & LOCKE
ALEXANDER & GREEN,
Solicitors for Complainant, Bankers Trust Company.

MAURICE E. LOCKE
W. W. GREEN
Of Counsel.

STATE OF NEW YORK,
Southern District of New York, } ss.:
COUNTY OF NEW YORK,

162 F. N. B. CLOSE, being duly sworn, deposes and says that he is an officer, to wit, the Vice-President of Bankers Trust Company, the complainant above named; that he has read the foregoing amended bill of complaint and knows the contents thereof; that the allegations contained therein in respect of the acts of said Bankers Trust Company are true of his knowledge, and that as to all other allegations contained therein he is credibly informed and believes the same to be true.

F. N. B. CLOSE

Subscribed and sworn to before me this 4th day of February, 1916.

(Notarial Seal) I. MICHAELS

Notary Public New York County N. Y. No. 2429

My commission and term of office as Notary Public expire March 30th, 1916.

Exhibit A

Second Mortgage.

The Texas and Pacific Railway Company

TO

The Mercantile Trust Company of New York.

Dated February 1st, 1888.

This Indenture, Made this first day of February, in the year one thousand eight hundred and eighty-eight, between THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation created by and existing under the laws of the United States of America, and of the States of Louisiana and Texas, hereinafter termed the Railway Company, and THE NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created by the laws of the State of Louisiana, parties of the first part, and the MERCANTILE TRUST COMPANY OF NEW YORK, a corporation existing under the laws of the State of New York, hereinafter termed the Trustee, party of the second part.

WHEREAS, The Texas-Pacific Railroad Company was, by its charter, approved by the President of the United States, March 3d, 1871, authorized and empowered to build a line of railway, complete in all its parts, from a point at or near Marshall, in the county of Harrison, State of Texas, westerly to a point at or near El Paso, thence through the Territories of New Mexico and Arizona, and the State of California, to ship's channel in the Bay of San Diego; and by its charter, and by other Congressional and legislative acts, was duly authorized and empowered to unite and consolidate with certain other railroad companies, and acquire all their rights, franchises, and property; and in pursuance of that power did purchase the property and franchises of the Southern Pacific Railroad Company of Texas, by deed dated March 21st, 1872, and did also purchase the rights, franchises, and property of the Southern Transcontinental Railway Company, by deed dated March 30th, 1872, and did also acquire as lessee a leasehold interest in the line of the Vicksburg,

Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company, the State line between Louisiana and Texas; and did also purchase and acquire from the New Orleans Pacific Railway Company, by articles of consolidation and conveyance, made the twentieth day of June, 1881, the franchises, corporate rights and privileges, and the track, roadbed, buildings, rolling stock, engines, tools, privileges, and property, real and personal, of the New Orleans Pacific Railway Company, except the land and land grants acquired by said New Orleans Pacific Railway Company from the Government of the United States, either directly or through the New Orleans, Baton Rouge and Vicksburg Railroad Company; it being provided, however, that the franchise of the New Orleans Pacific Railway Company to be and remain a corporation was not impaired by anything contained in said articles of consolidation and conveyance.

And the said New Orleans Pacific Railway Company unites in the execution of this indenture for the purpose of remising, releasing, and conveying to the said trustee whatever rights, interest, or estate, if any, may remain in the said company, in to, or of the mortgaged premises hereinafter described or any part thereof, to the end of investing the said trustee upon the trusts of this indenture with whatever right, title, or estate may remain, if any, in the said New Orleans Pacific Railway Company in or to the said premises herein mortgaged;

And whereas, The Congress of the United States passed an act, of date May 2d, 1872, by which the name and title of said company was changed to that of the Texas and Pacific Railway Company;

And Whereas, Other rights, privileges, and powers were granted and conferred by the acts of Congress of March 3d, 1873, and June 22d, 1874, and by virtue of said acts of incorporation and such other legislation amendatory thereof and

supplementary thereto the execution of this mortgage and issue of the bonds intended to be secured thereby is fully authorized;

And Whereas, The said Texas and Pacific Railway Company has heretofore constructed and is now the owner of the lines of railway, with the appurtenances, hereinafter described;

And Whereas, The Texas and Pacific Railway Company has also acquired, as aforesaid, the road constructed by and formerly belonging to the New Orleans Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, a distance from Shreveport to Gouldsboro, including said branch, of three hundred and thirty-six (336) miles;

And Whereas, The Texas and Pacific Railway Company has acquired the terminal properties hereinafter described in Gouldsboro and New Orleans, as well as other properties also so described;

And Whereas, At a meeting of the Board of Directors of the Texas and Pacific Railway Company, held on the third day of January, 1888, the following preamble and resolutions were adopted:

Whereas, For the purpose of retiring and adjusting the present mortgage indebtedness of The Texas and Pacific Railway Company in accordance with the terms of a plan of reorganization of the company as set forth in a certain agreement bearing date August 13th, 1886, between Isaac J. Wistar and others, a committee of the bondholders and stockholders of the Texas and Pacific Railway Company, and the stockholders, bondholders, and creditors of the company, it is necessary to make an issue of mortgage bonds, one of which to be an amount not exceeding $25,000,000, to be secured by a second mortgage upon

all and singular the railroad property and franchises of the company, which shall be used to settle with other creditors of the said company, as stipulated in the said agreeement and its amendments;

Resolved, That the President or Vice-President and Secretary of this Company be and they are hereby authorized and directed to execute under the common seal of this Company, its bonds to the amount of twenty-five million dollars, in form substantially as follows:—

No. $1000.

UNITED STATES OF AMERICA.

States of Louisiana and Texas.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

SECOND MORTGAGE INCOME BOND.

The Texas and Pacific Railway Company, a consolidated corporation existing under the laws of the United States and of the States of Louisiana and Texas, acknowledges itself to be indebted unto the bearer or after registration to the registered holder hereof in the sum of one thousand dollars ($1000) in gold coin of the United States of the present standard of weight and fineness, which sum the Railway Company promises to pay the bearer or registered holder in case of registration on the first day of December, A. D. 2000, at its office or agency in the City of New York, and to pay interest thereon out of the net income of the Railway Company as the same may be determined by its Board of Directors, at the rate of five per cent. per annum from December 1st, 1887, in like gold coin, at the said office or agency, payable annually on the first day of March following, on the surrender of the annexed coupons: *Provided, however*, That interest hereon shall be payable to the extent only that such net income, if any, permits, and that interest hereon shall be noncumulative.

On and after March 1st, 1892, the trustee of the mortgage securing this bond, in case of non-payment of full interest at five per cent. per annum, shall, on request of the holders of not less than one-third of the bonds outstanding, enter into possession of the mortgaged property and manage the same under the direction of a committee appointed by a majority of the bondholders, until payment of interest in full. All payments both of principal and interest shall be made without deduction of any taxes which the Railway Company may be required to pay or to retain therefrom by any present or future law of either of the said States or of the United States, the Railway Company hereby agreeing to pay all such taxes.

This bond is one of a series of bonds of like tenor and amount numbered from 1 to 25,000, both inclusive, and all equally secured by and subject to the terms and conditions of a second mortgage, to which reference is hereby made, bearing even date herewith, executed and delivered by the said Railway Company, to the Mercantile Trust Company of New York, as trustee, for the holders of said bonds, conveying its railroad franchises and certain other property therein more particularly described, subject to a first mortgage bearing even date herewith, to which reference is hereby made, given by the said Railway Company to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, as trustee, to secure an issue of bonds to the amount of $25,000,000.

This bond may be registered on the books of the said Railway Company, and after a registration of ownership shall be certified hereon by the transfer agent of the company no transfer will be valid unless made upon the said books, but such transfer may be made to bearer, which will restore transferability by delivery, and successive registrations to a party named or to bearer at the option of each owner may be made. And upon registration the owner may at his option surrender the unpaid coupons hereto annexed, which will thereupon be permanently canceled, and thereafter interest will be paid only to the registered owner, or to his authorized attorney, but until the coupons are surrendered they will continue to be payable and will be paid to the bearer thereof, although the

bond may have been registered. This bond shall not become obligatory until authenticated by the Trustee's certificate properly executed.

In Witness Whereof, The Texas and Pacific Railway Company has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of its President and Secretary, on the first day of February, A. D. one thousand eight hundred and eighty-eight.

President.

Secretary.

On the first day of March, A. D. , The Texas and Pacific Railway Company will pay to bearer, at its agency in New York, in gold coin, such portions of its net earnings, if any, not exceeding fifty dollars, as shall, in accordance with the mortgage securing the same, be then applicable to the payment of interest on its Second Mortgage bond No. . If there be no net earnings applicable thereto, this coupon will then become void.

Treasurer.

TRUSTEE'S CERTIFICATE.

The Mercantile Trust Company hereby certifies that this is one of a series of bonds issued under the terms of a mortgage of the Texas and Pacific Railway Company, bearing even date therewith, and therein more particularly referred to.

THE MERCANTILE TRUST COMPANY,
By

President.

Resolved also, That to secure the payment of said bonds, the President or Vice-President and Secretary of this Company execute a mortgage of all the property and franchises of the Company in form now presented and approved.

And Whereas, At a meeting of the Board of Directors of the New Orleans Pacific Railway Company the execution of this mortgage was duly authorized;

And Whereas, The Texas and Pacific Railway Company, in pursuance of said resolution and of all and every legal power and authority in them vested, propose to make, execute, and issue bonds secured hereby, in the manner heretofore mentioned, amounting in the aggregate to twenty-five million dollars:—

Now, therefore,

This Indenture Witnesseth, That the Texas and Pacific Railway Company and the New Orleans Pacific Railway Company, parties of the first part, for and in consideration of the premises and the sum of one dollar ($1) to them duly paid by the said Trustee party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure equally the payment of the principal and interest of the bonds aforesaid at any time outstanding, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm, assign, transfer and set over, and do hereby mortgage, hypothecate, and affect unto the said Trustee party hereto of the second part and its successors and assigns, all and singular the railroads, property, franchises, rights, and privileges of the Railway Companies, which are more particularly described as follows, viz:—

All of the Texas and Pacific Railway Company's line of railway, extending from a point on the State line between the States of Louisiana and Texas westwardly to Marshall and from Marshall by way of Dallas to Fort Worth, in the State of Texas; and from Texarkana on the State line between Texas and Arkansas, to its junction via Clarksville, Paris, Bonham, Sherman, and Whitesboro with the main line aforesaid at Fort Worth; and from Marshall aforesaid through the town of Jefferson to its

junction at or near Texarkana, with the said line from Texarkana to Forth Worth; and from Fort Worth aforesaid to a junction with the Southern Pacific Railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio Railroad. Also the right of joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about ninety miles; and also the right of way and partially constructed line of railroad from Sierra Blanca to El Paso, subject to the right however to issue bonds at the rate of ten thousand dollars a mile on said line from Sierra Blanca to El Paso, for the purpose of completing the same, and to secure the said bonds by a first mortgage which shall be prior in lien to this present instrument, upon said line from Sierra Blanca to El Paso, and also its leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad, extending from Shreveport, in the State of Louisiana, to a connection with the main line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, being a total mileage of about eleven hundred and fifty miles; and also the road whether acquired or constructed by and formerly belonging to the New Orleans Pacific Railway Company, now the property of the Texas and Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, said last-mentioned road from Shreveport to Gouldsboro, including said branch, being about three hundred and thirty-six (336) miles, and which includes the railway and railway property acquired from Morgan's Louisiana and Texas Railroad and Steamship Company by deed of February 15th, 1881, hereinafter mentioned; also all appurtenant lands acquired and all existing tracks, extensions, and connections, including all additions, extensions, and improvements constructed during the receivership under the proceedings instituted in the Circuit Court of the United States for the Fifth Circuit; also the right, title, and interest of the said Railway Company of, in, and to the Gordon Coal Mine and lands connected therewith in Palo Pinto county, Texas

and the spur of railroad of about six miles leading to said mine ; also all of the terminal properties in Westwego, Gouldsboro and New Orleans, described as follows :—

All the property in the city of New Orleans, State of Louisiana, conveyed by Greenville M. Dodge to the Texas and Pacific Railway Company, by deed dated June 27th, 1883, which deed was registered in the conveyance office at New Orleans, August 9th, 1883, in Book 119, folios 208 to 212, which said deed is hereby referred to and made part hereof ; for greater certainty, said property is described as follows :—

1. The whole of the square bounded by Front, Water, Terpsichore, and Thalia streets, in the First District of the city of New Orleans, State of Louisiana, with all improvements thereon.

2. A certain portion of ground with all improvements thereon, forming the corner of Terpsichore and Water streets, and Terpsichore and Pilie streets. Also all the rights as riparian owner and rights of accretion in front of the New Orleans Cotton Press extending to the Mississippi river.

3. Certain lots of ground with all the buildings and improvements thereon, situated in the First District in the square bounded by Pilie, Water, Thalia, and Terpsichore streets, composing the whole of the square bounded as above, together with a certain portion of ground bounded by Thalia, Pilie, and Terpsichore streets, and the Mississippi river and its riparian rights.

4. A certain piece of ground with all improvements thereon, in the First District on Front street, between Henderson and Terpsichore streets, extending to the Mississippi river, forming the apparent corner of Front and Terpsichore streets and having about one hundred and twenty-eight feet front on Front street, with its riparian rights.

5. A certain piece of ground situated in the Sixth District of the city of New Orleans, with all the improvements thereon, bounded in front by the Mississippi river, in the rear by Tchoupitoulas or Levee street ; on the lower line by Henry Clay avenue, and on the upper line by the New Orleans Park. All said property is more fully described in said deed of said

junction at or near Texarkana, with the said line from Texarkana to Forth Worth; and from Fort Worth aforesaid to a junction with the Southern Pacific Railway at Sierra Blanca, at which point it unites and connects with the Galveston, Harrisburg and San Antonio Railroad. Also the right of joint use of the road of the Galveston, Harrisburg and San Antonio Railroad Company between Sierra Blanca aforesaid and El Paso, a distance of about ninety miles; and also the right of way and partially constructed line of railroad from Sierra Blanca to El Paso, subject to the right however to issue bonds at the rate of ten thousand dollars a mile on said line from Sierra Blanca to El Paso, for the purpose of completing the same, and to secure the said bonds by a first mortgage which shall be prior in lien to this present instrument, upon said line from Sierra Blanca to El Paso, and also its leasehold interest in the line of railroad of the Vicksburg, Shreveport and Texas Railroad, extending from Shreveport, in the State of Louisiana, to a connection with the main line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, being a total mileage of about eleven hundred and fifty miles; and also the road whether acquired or constructed by and formerly belonging to the New Orleans Pacific Railway Company, now the property of the Texas and Pacific Railway Company, extending from Shreveport aforesaid to the town of Gouldsboro, opposite the city of New Orleans, in the State of Louisiana, including a branch to Baton Rouge, said last-mentioned road from Shreveport to Gouldsboro, including said branch, being about three hundred and thirty-six (336) miles, and which includes the railway and railway property acquired from Morgan's Louisiana and Texas Railroad and Steamship Company by deed of February 15th, 1881, hereinafter mentioned; also all appurtenant lands acquired and all existing tracks, extensions, and connections, including all additions, extensions, and improvements constructed during the receivership under the proceedings instituted in the Circuit Court of the United States for the Fifth Circuit; also the right, title, and interest of the said Railway Company of, in, and to the Gordon Coal Mine and lands connected therewith in Palo Pinto county, Texas

and the spur of railroad of about six miles leading to said mine ; also all of the terminal properties in Westwego, Gouldsboro and New Orleans, described as follows :—

All the property in the city of New Orleans, State of Louisiana, conveyed by Greenville M. Dodge to the Texas and Pacific Railway Company, by deed dated June 27th, 1883, which deed was registered in the conveyance office at New Orleans, August 9th, 1883, in Book 119, folios 208 to 212, which said deed is hereby referred to and made part hereof ; for greater certainty, said property is described as follows :—

1. The whole of the square bounded by Front, Water, Terpsichore, and Thalia streets, in the First District of the city of New Orleans, State of Louisiana, with all improvements thereon.

2. A certain portion of ground with all improvements thereon, forming the corner of Terpsichore and Water streets, and Terpsichore and Pilie streets. Also all the rights as riparian owner and rights of accretion in front of the New Orleans Cotton Press extending to the Mississippi river.

3. Certain lots of ground with all the buildings and improvements thereon, situated in the First District in the square bounded by Pilie, Water, Thalia, and Terpsichore streets, composing the whole of the square bounded as above, together with a certain portion of ground bounded by Thalia, Pilie, and Terpsichore streets, and the Mississippi river and its riparian rights.

4. A certain piece of ground with all improvements thereon, in the First District on Front street, between Henderson and Terpsichore streets, extending to the Mississippi river, forming the apparent corner of Front and Terpsichore streets and having about one hundred and twenty-eight feet front on Front street, with its riparian rights.

5. A certain piece of ground situated in the Sixth District of the city of New Orleans, with all the improvements thereon, bounded in front by the Mississippi river, in the rear by Tchoupitoulas or Levee street ; on the lower line by Henry Clay avenue, and on the upper line by the New Orleans Park. All said property is more fully described in said deed of said

Dodge hereunto referred to, and made part hereof, and forms part of the terminals of said railway in New Orleans.

6. Also the thirty-eight lots, squares, and portions of ground, with all buildings thereon, situated in the town of Gouldsboro, formerly McDonoughville, in the Parish of Jefferson, State of Louisiana, on the right bank of the Mississippi river, as set forth and described in a certain deed from G. M. Dodge to the Texas and Pacific Railway Company, dated 27th June, 1883, and recorded in said Parish, August 13th, 1883, in Conveyance-book P, folios 495 to 502, inclusive, hereby referred to and made part hereof, and described as therein shown and being in the yard limits and forming part of the terminals of said railway on the right bank of said river.

7. Also lots 14 and 15 in square 37, bounded by Adams, Jefferson, Copernicus, and Americus streets, in the town of Gouldsboro, described in a certain deed dated July 21st, 1883, from Thomas Carr to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folio 481, and hereby made part hereof, and forming part of said last-named terminals in said limits.

8. Also square of ground No. 52 in the town of Gouldsboro, bounded by Jefferson, Madison, Potolemy, and Lawrence streets, containing twelve lots described in a certain deed dated January, 26th, 1883, from Pierre Nougue to the Texas and Pacific Railway Company, duly registered in Book B, New Orleans, 116, folio 732; in Jefferson Book B, folios 280, 281, which deed is referred to for greater certainty and made part hereof, and forming part of said last-named terminals in said limits.

9. Also five certain lots of ground situated on the right bank of the Mississippi river opposite New Orleans, in the town of Gouldsboro, in square No. 14, bounded by Adams, Copernicus, Americus streets, and the Levee, as described in a deed dated 9th December, 1882, from Louis Schwartz to the Texas and Pacific Railway Company, duly registered in Conveyance-book P, folios 232 and 233, and made part hereof for greater certainty, and forming part of said last-named terminals.

Also the lot on the actual corner of Front and Terpsichore streets, in the city of New Orleans, having forty-seven feet front on Front street, more or less, and extending to the Mississippi river, the legal line of Terpsichore street being its northerly boundary, and with the riparian rights, and forming part of the terminals of the Railway Company in New Orleans.

Also all and singular that certain tract and parcel of land situate in the parish of Jefferson, in the State of Louisiana, on the right bank of the Mississippi river, which was sold and conveyed to the New Orleans Pacific Railway Company by the Morgan's Louisiana and Texas Railroad and Steamship Company, by deed dated the fifteenth day of February, 1881, with other property, for the consideration of $745,110.42, which said deed is duly recorded in Book of Conveyances N. 32, folio 199, &c., Parish of Ascension, on the seventeenth day of February, 1881, and which land, comprising about one hundred and seventy-three acres, more or less, forms part of the terminals of said railway at Westwego. Also the tract of land of eighty acres, more or less, at Wheelock, parish of Iberville, forming relay station. Also the transfer steamer "Gouldsboro," at New Orleans, her tackle, apparel, furniture, and machinery, and the new transfer boat now being built at New Orleans. Also all the rights, privileges, and franchises conferred by the city of New Orleans and other municipal corporations on the New Orleans Pacific Railway Company and its assigns, the Texas and Pacific Railway Company, by ordinance or grant.

Also all and singular the terminal properties and facilities, and their appurtenances, situated in Westwego, Gouldsboro, and New Orleans, and now in the possession and use of the said Texas and Pacific Railway Company in the conduct and operation of its road and the transaction of its business, whether acquired by donation, purchase or expropriation, including steamboats, warehouses, and docks; and including and intending to include in these presents the road-bed and superstructure and the right of way of said railroad, rails, tracks, side tracks, bridges, viaducts, buildings, depots, station-houses, car-houses, engine-houses, shops, warehouses, turn-

tables, water-stations, fences, structures, erections, fixtures, and appurtenances, and all other things of whatever kind thereunto belonging or in anywise appertaining, or which have been or may be acquired or provided for use upon or in connection with the said railroad; and all lands acquired or designed for depots, warehouses, and other structures at either terminus, as well as along the line of said road; and also all gravel pits and sand pits at any time heretofore acquired for the use of said road, all the locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels, now or hereafter belonging or appertaining to said railroad, and all property, both real and personal, of every kind and description which shall hereafter be acquired for use upon or in connection with, or for the purposes of the said railroad, and whether acquired heretofore or hereafter by said Railway Company or its Receivers; and all the corporate rights, privileges, and franchises which the said Railway Companies, or either of them, have and can exercise or shall hereafter acquire or possess, of, in, to, upon, or in respect of the said railroad, or any part thereof, or necessary for the construction, maintenance, or operation of said railroad between said points, or anything belonging or appertaining, or which may hereafter belong or appertain to the same, or any part thereof, and all the rents, issues, profits, tolls, and other income of the said railroad, and all the rights, privileges, and franchises whatsoever which the said Railway Companies now possess, own, or are entitled to, and all rights, privileges, and franchises, properties real and personal, and rights and things which the said Railway Companies may or shall acquire, possess or become entitled to for the purposes of or in connection with the said railway, or in the operation, use, and maintenance thereof, and all the corporate and other franchises of the said railway companies, including their franchise to be corporations. Including all the franchises, rights, privileges, and property acquired from the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Vicksburg, Shreveport and Texas Railroad Company, and the New Orleans Pacific Railway Company.

TO HAVE AND TO HOLD The said above-described premises, railroads, property, rights, franchises and appurtenances, unto the said Trustee, and its lawful successors or successor, heirs, executors, administrators, and assigns forever, to and for the only proper use and behoof of the Trustee and its successors or successor, heirs, executors, administrators, and assigns forever, subject, however, to the mortgage or deed of trust to the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Trustee, bearing even date herewith, to secure bonds amounting to $25,000,000, and to the payment of all the bonds issued or to be issued thereunder, as well as the School Fund Loan and the mortgage on the Eastern Division in said mortgage for $25,000,000 referred to.

AND ALSO SUBJECT TO THE RIGHT OF the Railway Company, with the assent of two-thirds of the members of its board of directors to protect its business by the construction or acquisition of branch or connecting lines, and to mortgage the branches so constructed or acquired at a rate not exceeding $12,500 a mile, and at a rate of interest not exceeding five per cent. per annum, or to assume existing mortgages of no greater amount per mile or rate of interest on branch or connecting lines, and to contract that the amount required to pay the interest upon the bonds so issued or assumed shall be made a rental charge, and in case of any deficiency in the earnings of said branch lines to meet such rental charge, that the same shall be made up out of the earnings of the lines of railway, and property hereby mortgaged, and before payment of interest on the second mortgage, the sum necessary to meet such deficiency to be a charge upon the income of the Railway Company prior to the interest upon the said Second Mortgage Bonds.

BUT IN TRUST, NEVERTHELESS, For the equal *pro rata* benefit and security of all and every the persons, firms, or corporations who may be or become holders of the said bonds issued under and secured by this deed of trust or mortgage without preference, priority, or distinction as to lien or otherwise of any one

over the others, by reason of priority in time of issuing or negotiating the same, and so that each and all of the said bonds, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under and by this deed of trust or mortgage, and shall all be equally secured hereby, with like effect as if they had all been made, executed, delivered, and negotiated simultaneously on the date of the execution and delivery hereof, it being intended that the lien and security of all of the said bonds shall take effect from the date of the execution and delivery of this deed of trust or mortgage, whether the same shall actually be sold or disposed of at such date, or whether they or any part of them shall be negotiated and sold at some future date, and that the lien and security of this deed of trust or mortgage, and all the bonds that may be issued under the same, shall take effect from the date of the execution and delivery hereof as though actually sold and delivered to and in the hands of innocent holders for value upon such date and the lien and security of said bonds shall in no manner be altered, impaired, or prejudiced by the creation of subsequent mortgages by the Railway Company or by the entry or acquisition of judgments or liens in any form by creditors at any future time.

AND IT IS HEREBY EXPRESSLY COVENANTED AND UNDERSTOOD, By and between the parties of the first and second parts hereto, the parties of the first part covenanting as well for themselves as for their successors and assigns, and the Trustee covenanting as well for itself as for its successors or successor in the trust; that the said above described premises, railway, property, rights, franchises, and appurtenances, are to be had and holden by the said Trustee upon and for the trust, uses, and purposes following, that is to say:

ARTICLE ONE.—The bonds to be issued under and secured by these presents, hereinafter designated as Second Mortgage Bonds, shall not exceed in the aggregate $25,000,000; AND WHEREAS, The bonds to be issued under and secured by this mortgage, or so many thereof as shall be necessary, are to-

gether with certain bonds to be issued under the first mortgage of contemporaneous date herewith to be used for the purpose of exchanging into the bonds of the Railway Company and of the New Orleans Pacific Railway Company which have been deposited under the said Plan of Reorganization and secured by the mortgages of the Railway Companies, known as the Eastern Division Consolidated Mortgage, the New Orleans Pacific Division Mortgage, the Rio Grande Division Mortgage, and the General and Terminal Mortgage, and of settling with the holders of the Land Grant Bonds, and it may be unadvisable or impracticable to secure the immediate satisfaction or release of the said mortgages, it is further covenanted and agreed that the bonds issued under the said several mortgages, and deposited under the said plan, shall be transferred and delivered to the trustee of the first mortgage to be held as security for the bonds to be issued under this present indenture of mortgage and a first mortgage to be issued by the Railway Company cotemporaneously herewith, until the said mortgages shall have been satisfied, or, in the judgment of the trustee of the first mortgage, it is prudent to cause the bonds so transferred and delivered to be cancelled.

ARTICLE TWO.—Until default shall be made by the said Texas and Pacific Railway Company, its successors or assigns, in the due and punctual observance and performance of any one or more of the covenants and agreements herein contained, on the part and behalf of said Railway Company, its successors and assigns, to be kept and performed; the said Railway Company, its successors and assigns, shall be suffered and permitted to have the actual possession of the railway property and premises hereinbefore described, and of the whole thereof, to use and employ the same and every part thereof, and to exercise and enjoy all the rights and franchises appertaining thereto, and to collect, receive, and use the tolls, incomes, rents, issues, and profits thereof, in any manner, which will not impair the lien created by these presents.

ARTICLE THREE.—And the said Texas and Pacific Railway

Company, in consideration of the premises, covenants, promises, and agrees :—

I. That having possession, as aforesaid, it shall and will well and truly pay off and discharge, or cause to be paid off and discharged, each and every tax, assessment, or other liability and governmental charge, which may, from time to time, be lawfully levied or imposed by competent authority upon the said railway property and premises or upon any part thereof, the lien whereof might or could be held to be superior to the lien of these presents, and also the interest which from time to time may become due and payable upon any bonds, the payment of which is secured by a mortgage prior in lien to these presents, and the principal of said bonds as and when the same shall mature, so that the security of the bonds issued herewith shall at all times be duly maintained and preserved.

II. That having possession, as aforesaid, it shall and will at all times maintain in full quantity, number, and efficiency and keep insured its rolling stock, tools and machinery, buildings, bridges or other structures, erected or to be erected on the premises, and all other property provided for use in connection with the railway herein described, usually insured by railway companies, and in the same manner and to the same extent, and simultaneously with the execution hereof it will furnish to the Trustee a full and complete inventory or schedule of said rolling stock and equipment.

III. That having possession, as aforesaid, it shall and will diligently preserve all the rights and franchises to it granted and upon it conferred by the acts of Congress, appertaining to the railway property and premises subject to the lien hereof and otherwise, and whenever necessary or advisable comply with the laws of any State wherein the routes aforesaid, or any it may hereafter acquire the right to construct its road on or any part thereof, may now or shall at any time hereafter be situate, in such manner and form as counsel learned in the law shall advise, with a view to effectually preserve, obtain, or secure the corporate rights and franchises,

enabling it to locate, construct, use, operate, and maintain the said railway line or lines whereon these presents shall constitute a lien throughout the whole extent thereof, and charge tolls thereon for the transportation of passengers and freights, and that using and operating the said railway as the same was heretofore constructed, or as the same or any section or part thereof shall hereafter be constructed and completed, ready for use and operation, it shall and will, at all times, maintain, preserve, and keep the same, and every part thereof, with the rolling stock, fixtures, and appurtenances, and every part and parcel thereof, in thorough repair and working order, at least equal to its present condition in respect to the road-bed, ties, and rails, motive power, rolling stock and equipment, and fully supplied with suitable and sufficient motive power, rolling stock, and equipment, and shall and will, from time to time, make all needful and proper repairs, renewals and replacements, useful alterations, additions, betterments and improvements, so as to maintain the same in proper order and in complete repair and good working condition, so that the traffic and business of the said road and of every part thereof shall at all times be done with safety and expedition.

IV. That it shall not and will not issue, negotiate, sell, or otherwise dispose of the Second Mortgage Bonds to be issued hereunder, in any manner inconsistent with the provisions of these presents, and its agreements in that behalf herein contained, and that issuing, selling, negotiating, or otherwise disposing of its Second Mortgage Bonds, from time to time, it shall and will well and truly apply, or cause to be applied the same, or the proceeds thereof, to and for no purposes other than those hereby contemplated as aforesaid.

V. That it shall and will well and truly pay, or cause to be paid, to the holders of the Second Mortgage Bonds to be issued hereunder, as hereinbefore stated, or of such of the said Second Mortgage Bonds as shall from time to time be outstanding and secured hereby, and every one of them, the principal thereof, according to the true intent and meaning thereof, and pay interest on said principal sum up to the rate

of five per cent. per annum from December 1st, 1887, payable annually on the first day of March in each year, the first payment, if any, to be due March 1st, 1889, in like gold coin out of the net income of the Railway Company, as the same may be determined by the board of directors of the Railway Company. If the income of the Railway Company applicable for the interest on said bonds shall not, in the judgment of the board of directors, be sufficient to pay the said interest in full, such interest or so much as shall remain unpaid shall not accumulate, and all payments both of principal and interest shall be without deduction from either said principal or interest for any tax or taxes which, by any present or future laws of the United States or the States of Texas and Louisiana, may be payable for or in respect of the said principal or interest for national, State, or municipal purposes; the Railway Company hereby agreeing to pay all such tax or taxes which it may now or hereafter be required by any such law to retain therefrom.

And in case of default of such payment by said Texas and Pacific Railway Company, from any cause whatever, the Railway Companies for the consideration in said Second Mortgage Bonds mentioned, further hereby covenant, promise, and agree that they shall not and will not at any time hereafter insist on or plead in any manner whatever, claim or take the benefit or advantage of any stay or extension law, which may now or at any time hereafter be in force, in any locality where the railway property and premises hereby conveyed or intended so to be, or any part thereof, may or shall be situate; or claim, take, or insist on the benefit or advantage to be derived from any law, now or hereafter in force, as aforesaid, providing for the valuation or appraisement of said railway property or premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to the provisions hereinafter contained or the decree of any court of competent jurisdiction; or after any such sale or sales, claim or exercise any right which they may now or hereafter have, by statute enacted by the legislature of the State of Texas or Louisiana, or other State wherein the said railway property or premises, or any part

thereof shall or may be situate, to redeem the property so sold, or any part thereof; and said Railway Companies hereby expressly waive all benefit and advantage that they might or could derive by virtue of any such law or laws and agree not to hinder, delay, or impede the execution by said Trustee of the powers of entry and sale hereinafter conferred upon, granted, and delegated to it, but to suffer and permit the execution of such powers, as if such law or laws had not been made or enacted.

VI. Further, that at all times until said Second Mortgage Bonds, with interest, shall be fully paid, the Railway Company will permit the Trustee, its agents, clerks, or attorneys, for that purpose to be duly authorized, fully to inspect all the books of account of the Railway Company, together with its books, reports, memoranda, or other papers, and to take such extracts therefrom as may be deemed expedient to fully report thereon, with convenient details. And further, that if at any time the net income of the road hereinbefore conveyed properly applicable to the payment of the interest on the outstanding bonds hereby secured shall be insufficient for such payment, the Railway Company will, without delay, furnish to the Trustee full and detailed accounts and statements of the gross earnings and receipts of said road, and of all the expenses, disbursements, and deductions out of or charged against the same during the period in which there shall be such deficiency.

VII. The Railway Company shall and will from time to time hereafter, upon the demand of the Trustee, grant, convey, confirm, assign, transfer, and set over unto the said Trustee all real estate which may be hereafter acquired, and all personal estate, corporate rights, and franchises which it, the Railway Company, shall hereafter in any way or manner acquire as appurtenant to, or in, or for use upon, or for the business of the railroads hereby mortgaged, or any of them, and shall and will also make, do, seal, execute, deliver, and acknowledge, or cause to be made, done, sealed, executed, de-

livered, and acknowledged, all and every such further acts, matters, things, deeds, conveyances, bills of sale and transfers, and assurances in the law for the better assuring, conveying, and confirming unto the Trustee all and singular the hereditaments and premises, estates and property hereby conveyed, or intended so to be, or which are hereby covenanted and agreed to be hereafter conveyed to the said Trustee as by such Trustee, or their counsel learned in the law, shall be desired or required for the better effectuating and carrying out the provisions, objects, and purposes of this mortgage, and securing payment of the principal and interest of the bonds intended to be hereby secured; all of which estates shall be held by the said Trustee in, under, and upon the several and respective trusts, and for the uses and purposes and subject to the powers and authorities herein mentioned, declared, given and expressed.

ARTICLE FOUR.—In case default shall be made by said Railway Company on or after March 1st, 1892, in the payment of full interest at the rate of five per cent. per annum on any of the Second Mortgage Bonds which may at any time have been issued and be then outstanding and secured by these presents or in case default shall be made by said Railway Company in the payment of the principal of any of such bonds when and as the same, according to the terms thereof, shall mature; or in case default shall be made by said Railway Company in the payment of any tax, assessment, or other governmental charge lawfully levied and imposed upon the said railway property and premises, or any part thereof, or any other prior lien, and such default shall continue for the period of three months after such tax, assessment, or other governmental charge or lien shall have become due and payable; or in case said Railway Company shall make default in the due observance and performance of its covenant of further assurance, or any other of its covenants, promises and agreements herein contained, and either of such defaults continue for the period of three months; then and in each and every such case of default continued as aforesaid, on the request of holders of not less than

one-third of the bonds outstanding the said Trustee shall personally, or by its agent or agents, attorney or attorneys, enter into and upon all and singular the railway property and premises, lands, rights, interests, and franchises hereby conveyed or intended so to be, and each and every part thereof, and exclude the said Railway Company, its agents and servants wholly therefrom, and having and holding the same, use and operate, manage and control said railway, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, and servants or attorneys, to the best advantage of the interests as well of the public as of the holders of Second Mortgage Bonds secured hereby in accordance with law and any statute relating to said railway or any part thereof, or to the operation thereof; and upon such entry it shall be lawful for the said Trustee from time to time to insure or keep insured, at the expense of the trust estate, the rolling stock, tools and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railway, and whereof it shall become possessed as aforesaid in the same manner and to the same extent as is usual with railway companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and replacements, and useful alterations, additions, betterments, and improvements thereto and thereon, as well in respect of the rolling stock or equipments as in respect of the railway and appurtenances and other subject-matters as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railway and conducting the business thereof and of all repairs, renewals replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a just and reasonable compensation for its own services and compensation to all agents,

clerks, servants, and other employés by it properly engaged and employed, the said Trustees shall apply the moneys arising as aforesaid, to the payment of the interest which shall be due and payable on the bonds outstanding and secured hereby, in the order in which such interest shall become due, ratably to the persons or parties entitled to receive the same: *Provided, however*, That the holders of a majority of the said bonds may appoint a committee to direct and supervise the management of the property by said Trustee, which committee shall have such powers, control, and supervision, as are or may be conferred upon and exercised by the board of directors of the Railway Company.

ARTICLE FIVE.—There shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured hereby, except in the event of the foreclosure of the first mortgage, but in case default shall be made by the said Company in the payment of the principal of any of the said Second Mortgage Bonds, when the same shall become and be due as therein or hereinbefore provided, and in each such case of default it shall be lawful for the said Trustee, after entry as aforesaid, or other entry, or without any entry, personally or by its attorneys or attorney, agents or agent, to sell and dispose of all and singular the railway property and premises, rights, franchises and interests, lands and appurtenances, hereby conveyed or intended so to be, or from time to time as they shall deem proper, of so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay the amount due on such bonds then outstanding, for principal and interest, according to the terms thereof, together with the costs and expenses of such sale, and of all right, title, and interest, claim and demand whatsoever, benefit, equity of redemption, and statutory right to redeem of the said Company, its successors and assigns, of, in, and to the same, or so much thereof as may be sold, and every part thereof, at public auction at such place in the city of New Orleans, or on the premises or any part thereof, and at such time and upon such terms

as may be specified in the notice of sale to be given as hereinafter provided, for the highest and best price the same will bring in cash.

Preparatory to such sale the said Trustee shall give notice of the time and place, when and where, and the terms upon which, the same is to be made, and containing a description of the property to be sold, by advertisement thereof in one newspaper at that time published in each of the cities of New Orleans, Philadelphia, and New York, and in the State of Texas, once a week for six successive weeks; and upon any sale or sales under this instrument the said Trustee is hereby empowered to make, execute, and deliver to the purchaser or purchasers at any such sale a good and sufficient deed, or good and sufficient deeds of conveyance, for the railway property and franchises sold. In case of any sale or sales by virtue of any of the provisions of this instrument, the said company hereby expressly and absolutely agrees to waive, and hereby irrevocably waives the benefit or advantage of any and all valuation, stay, appraisement, or extension laws, and any statutory right to redeem, now existing, or which may hereafter be in force in the State or States wherein the property to be sold under this instrument or any part thereof, may at the time of the sale be situate, or where the sale may take place, which, but for this provision, agreement, and waiver might be operative, in respect of any such sale, or might be availed of to prevent or postpone an absolute or immediate sale under the provisions of this instrument, or to redeem after any sale the property sold thereat, or any part thereof; and it is likewise expressly declared that any sale or sales made by said Trustee, under or by virtue of this instrument, when completed, shall operate to divest all title, rights and interest, claims and demands whatsoever both at law and in equity of said Railway Companies of, in, and to the rights, property, powers, privileges, and franchises sold, and shall be a perpetual bar both at law and in equity against the said Railway Companies, their successors and assigns, and any and all persons whomsoever claiming or to claim the railroad property, rights, powers, privileges, and franchises sold, or any part or parcel thereof, by, from, through, or under the said Rail-

way Companies, its successors and assigns, or any of them. And the said Trustee shall apply the proceeds or avails of any sale to be made under the provisions of this instrument, and the purchase-money paid thereon, after, deducting therefrom just allowances for all expenses connected therewith, including attorney and counsel fees, as well as any and all advances, expenses, and liabilities which may have been made or incurred by said Trustee in using, operating, maintaining, and preserving said railroad property and premises, or in carrying on and managing the business for the period the same may have been in the said Trustee's possession, or in arranging for making and completing the sale and payments for taxes, assessments, or other charges or liens prior to the lien of these presents, if any such there shall then be, and the said railway property and premises, or any part thereof, shall not have been sold subject thereto, as well as just and reasonable compensation for the said Trustee's own services, to the payment of the principal of such of said bonds as may be at that time outstanding, and of the interest which shall have accrued upon the said principal up to that time, according to the tenor thereof, without discrimination or preference as between principal and interest, but ratably, to the aggregate amount of such principal and accrued interest; it being understood and hereby declared and agreed, that such payment shall be made to the persons holding the bonds evidencing the right to such principal and interest, without discrimination or preference between them on account of the time of the actual issue of said bonds, and, if after payment in full of all the said bonds, principal and interest, a surplus of the said proceeds of sale shall remain, the said Trustee shall pay over such surplus to the said Railway Company, its successors or assigns, or as any court of competent jurisdiction shall lawfully direct.

And it is hereby declared and agreed that the said Trustee may, from time to time, adjourn any sale to be made under the provisions of this instrument, by announcement made at the time and place appointed for such sale, and if so adjourning such sale, may make the same at the time and place to which the same shall be so adjourned, and without further notice thereof.

And it is further declared and agreed that the receipt of the Trustee shall be a sufficient discharge to the purchaser or purchasers of the property, which shall be sold as aforesaid for his or their purchase-money, and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after paying such purchase-money and receiving such receipt, be liable to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in any manner whatsoever answerable for any loss, misapplication, or non-application of any such purchase-money, or any part thereof.

And it is further agreed that no part of the premises hereby mortgaged or intended so to be shall be sold under proceedings at law, by the holder or holders of all or any of the bonds intended to be hereby secured, it being the intention and agreement of the parties for the better securing the largest possible price for the mortgaged premises in the event of a sale thereof, that the same shall only be sold in the manner herein provided or under proper proceedings in a Court of Equity for the foreclosure of this mortgage.

ARTICLE SIX.—It is hereby mutually agreed, that at any public sale of the railway property, premises, rights, privileges, and franchises hereinbefore conveyed, made by virtue of the powers herein granted, or by judicial authority, for the purpose of enforcing the lien of these presents, the Trustee, under these presents for the time being may, in its discretion and not otherwise, bid for, and if the same be obtainable at the price hereafter mentioned, purchase and acquire the property so offered for sale, in behalf of all the holders of bonds secured by this instrument, which shall then be outstanding, in proportion to the amount of said bonds by them respectively held: *Provided, however*, That nothing herein contained shall authorize the said Trustee to bid, on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding, with the interest accrued thereon, according to the tenor thereof, and the costs and expenses of such sale for the entire property then held upon the trusts of this inden-

ture, or any amount reasonably proportionate thereto, for any part of said property.

And it is further agreed, that the Second Mortgage Bonds shall be received in payment of the purchase-money of any property sold by virtue hereof, as equivalent to so much cash of the said purchase-money as would be distributable and payable thereon.

ARTICLE SEVEN.—Upon the filing of a bill in equity or other commencement of judicial proceedings to enforce the rights of the Trustee and of the bondholders under these presents, the said Trustee shall be entitled to exercise the right of entry herein conferred, or to the appointment by any court of competent jurisdiction of a receiver or receivers of the property hereby mortgaged, or of the earnings, revenue, rents, issues, or profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

ARTICLE EIGHT.—The Railway Company may at any time hereafter and before the full payment of the bonds secured hereby, and whenever it shall deem it expedient for the better security of the said bonds, although there may not then have occurred any such default as to entitle the said Trustee to enter into possession under article five hereof, surrender and deliver to said Trustee full possession of the whole, or any part of the said railway property and premises, rolling stock, lands and appurtenances, rights, franchises and interests, hereby conveyed or intended so to be, for any term or terms, certain or indefinite. The said Trustee, upon such surrender and delivery, may at its option, enter into and upon the premises so surrendered and delivered, and take and receive possession thereof, for such term or terms, certain or indefinite, as aforesaid, without prejudice, however, to its rights at any time subsequently to insist upon and maintain such possession, though beyond such term, whenever it would have been entitled thereto, had no such voluntary surrender been made.

And upon the voluntary surrender and delivery of the said railway property and premises, or any part thereof, as herein

provided, the said Trustee shall and will during the term or terms for which possession shall be taken, and while said property and premises shall remain in its possession, work, use, manage, control, and employ the same, in accordance with the provisions of article four of these presents, and receive the incomes and revenues thereof, and apply the same to the best advantage of all parties in interest.

ARTICLE NINE.—And it is further mutually agreed that the said Railway Company shall and will keep a register or registers of bonds issued hereunder at its office or agency in the city of New York, which shall at all reasonable times be open to the inspection to the Trustee, and that any holder or holders of any of the bonds issued under the provisions hereof may register his or their bond or bonds upon presenting the same, and that when a bond shall be so registered the person or persons in whose name or names the same shall be registered, shall be deemed and regarded as the owner or owners thereof for all purposes, and payment of or on account of the principal sum in such registered bond mentioned, shall thereafter be made to such person or persons, his or their order only, and all such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid, provided that such registry may be changed, and the bonds so registered be transferred, upon presentation with the written order of the person or persons in whose name or names the same shall stand registered, properly authenticated, to the person or persons whose name or names shall in such written order be contained to that end; and thereafter the person or persons to whom such bond shall have been so transferred as aforesaid shall be held to be the owner or owners thereof with all the incidental rights and powers, and such transfers may be made from time to time as the registered owner or owners of any such bond for the time being may direct as aforesaid; and the registered owner or owners shall also have the right to register any of the bonds registered in his or their names, as payable to bearer, in which case the transferability by delivery shall be restored, and the principal

thereof be payable to the person presenting the same. But any holder or holders of a bond registered to bearer may again cause such bond to be registered in his name or their names with the same effect as the first registration, and successive registrations as aforesaid may be made from time to time as desired.

It is further mutually agreed that any registered owner may likewise make such interest on any bond standing registered in his name, payable only to him or his order, by surrender of all coupons to such bonds annexed and representing the interest to become due thereon, which surrender when certified on such bond as aforesaid, shall not in any wise operate as a discharge to the Railway Company of its obligation to pay such interest as in said bonds provided, but payments of such interest shall nevertheless thereafter be made to the person appearing on such registry as the owner thereof, or his order, at the time such interest shall become payable, and any such payments so made shall be valid and effectual to satisfy and discharge the obligation for such interest to the extent of the sum or sums so paid.

ARTICLE TEN.—The Trustee shall have full power, in its discretion, and upon the written request of the said Railway Company, at any time to release from the lien and operation of this trust deed and of the said bonds, unto the Railway Company, or to persons by it designated therefor, any portion or portions of the premises acquired, held, or used by said Railway Company for the purpose of stations, depots, shops, or other buildings or erections or other uses not connected with the maintenance and operation of the railway or any part thereof, or which may have been acquired or held for the supply of gravel, fuel, and other materials for the purposes of said railway or any part thereof, which, in the judgment of the Trustee shall, at the time of such release, be no longer requisite for use for the purposes for which the same shall have been so acquired or used, nor necessary or expedient to be retained for use in connection with the said railway line, on or along the routes aforesaid, or any of them,

and likewise any parts of the original line of track or roadway, and of the depot grounds, buildings or accommodations connected therewith, which may have been thrown out of use, and ceased to form part of the railway, at the time of such release, by reason of straightening or alteration of the line of the road: *Provided always*, That the power of release given by this article is designed to be exercised only in case of the Railway Company's selling or contracting to sell the property so to be released, because of its being no longer required for the uses or purposes of said railway, and requiring the same to be so released, in order to give a perfect title to the purchaser or purchasers: *And provided, further*, That where such released premises shall have been thrown out of use, or ceased to be required, by reason of changes of the line of the road, on or along the routes aforesaid, or any of them, or change of depot grounds, buildings or other accommodations, the substitutes which the Railway Company shall have acquired therefor shall be conveyed by appropriate deeds to the Trustee upon the trusts and for the purposes of this indenture, before the giving of such release: *And it is further provided*, That the Trustee shall also have full power to allow the said Railway Company, from time to time, to dispose of, according to its discretion, such portion of the machinery, equipments, and implements, at any time held or acquired for the use of the said road, as may have become unfit for such use, provided the same be replaced by new, which shall be conveyed to the Trustee, or be otherwise made clearly subject to the operation of these presents.

That the said Trustee shall not be answerable for the default or misconduct of any agent or attorney who may be appointed by them in pursuance hereto, if such agent or attorney be selected with reasonable care; or for anything whatsoever, in connection with this trust, except misconduct or gross negligence; the said Trustee shall not be personally liable for any debts contracted by it, for damages to persons or property carried or injured, or for salaries, or non-fulfillment of contracts, during any period while said Trustee shall manage the trust property or premises upon

entry or voluntary surrender as aforesaid, but all such debts and liabilities shall be and constitute a first and paramount charge upon the trust funds and property.

It is mutually agreed that the term or words "the Trustee," "said Trustee," and "the said Trustee," as used in this indenture, shall be held and construed to mean the Trustee for the time being, whether original or new, and whenever a vacancy shall exist, to mean the continuing Trustee, and such Trustee shall, during such vacancy, be possessed of and be competent to exercise all the powers by these presents granted to the parties of the second part.

And it is further mutually agreed that the said Trustee, or any Trustee or Trustees hereafter appointed, may resign and be discharged of the trusts created by these presents by giving notice, in writing, to the said Company and to the bondholders, by publication thereof, at least twice a week, for six successive weeks, in a newspaper published in New York City, at least thirty days before such resignation shall take effect, and upon the due execution of the conveyance hereinafter required.

And it is further agreed that the Trustee may be removed at any time by an instrument in writing, under the hands and seals of a majority in interest of the holders of the bonds secured hereby and then outstanding, and in case a trustee should die, or should resign or be removed, as herein provided, or by a court of competent jurisdiction, a majority in amount of holders of the then outstanding bonds hereunder, shall have the right and power, by instrument in writing under their hands and seals, to appoint a new trustee to fill such vacancy, and until such appointment be so made by a majority of the bondholders, the board of directors of the Railway Company may appoint a new trustee to fill such vacancy for the time being, but subject to the right of removal by the holders of a majority of said bonds as already provided, and in either case the new trustee so appointed shall, while he continues as such, have and possess, and be subject to the like rights, power, estates, and duties as if he had been the original Trustee hereunder; and should any deeds, conveyances, or in-

struments in writing, to be executed, acknowledged and delivered on the part of the Railway Company, and the resigning or removed trustee, or either of them, be required by such new trustee, for more fully and certainly vesting in and confirming to him such estate, rights, powers, and duties, such deeds, conveyances, and instruments of writing shall on request be made, executed, acknowledged and delivered.

And it is further expressly understood and agreed that all the covenants, stipulations, promises, and agreements herein contained by or on behalf of said Company, shall bind and be binding upon its successors and assigns, whether so expressed or not.

ARTICLE ELEVEN.—If the said company shall well and truly pay or cause to be paid all bonds to be issued under or entitled to the protection of this deed of trust, and the coupons attached thereto, at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of these presents, then, and in that case, all property, rights, and interests hereby conveyed shall revert to the said Company, and the estate, right, title, and interest of the said Trustee aforesaid, shall thereupon cease, determine, and become void; otherwise the same shall be, continue, and remain in full force and virtue.

And inasmuch as it is intended that this indenture shall be simultaneously recorded in the proper office in each of the several counties of Texas and parishes of Louisiana wherein the railway property and premises conveyed hereby, or intended so to be, or some part thereof is situate, or as near at the same time as possible; this indenture further witnesseth that although twenty copies or counterparts thereof are simultaneously executed by the company under its corporate seal, attested by its president and secretary, in pursuance of a resolution of its board of directors, and delivered to the said Trustee; and the said Trustee, in evidence of its acceptance of the trusts thereby created, have likewise to each of said twenty copies or counterparts set their hands and affixed their seals simulta-

neously, to the end that one thereof may be recorded in each of said counties as aforesaid, all such copies or counterparts so executed and delivered, each as an original, shall constitute but one instrument.

ARTICLE TWELVE.—And this indenture witnesseth and it is further declared that this instrument, embracing property situate in the States of Texas and Louisiana, is intended in both States to be a mortgage of all the property hereinbefore described; and is intended to mortgage, hypothecate, and affect, and the parties of the first part do hereby mortgage, hypothecate, and affect the said property in the State of Louisiana unto and in favor of the party of the second part, as well as in favor of any present or future holder of said bonds or coupons, or any of them, for securing the payment thereof, and all other covenants of the mortgagors herein contained; so as to make this instrument as to all said property in the State of Louisiana a mortgage according to her laws and jurisprudence, and not an act of sale. And this indenture, so far as it embraces property situate in the State of Texas, is also intended to be a mortgage thereof according to her laws, for the purposes and upon the trusts in this indenture set forth.

IN WITNESS WHEREOF, The parties hereto have caused their respective corporate seals to be hereunto affixed and the same to be attested by the signatures of their respective Presidents and Secretaries, in pursuance of resolutions of their Boards of Directors, the day and year first above written.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By
JNO. C. BROWN,
1st Vice and Acting President.

Seal of The Texas and Pacific Railway Company.

Attest:
C. E. SATTERLEE,
Secretary.

Witnesses:
CHAS. BOURKE,
W. R. FIELD,
and
THOS. B. CLIFFORD,
Commissioner.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY,
By
E. B. WHEELOCK,
President.

Seal of The New Orleans Pacific Railway Company.

Attest:
ROBT. STRONG,
Secretary.

Witnesses:
J. R. EDGETT,
C. M. EUSTIS.

The Mercantile Trust Company, Trustee named in the foregoing indenture of mortgage, hereby accepts the trusts in the said mortgage declared and provided, and agrees to perform the same.

WITNESS the corporate seal of the Mercantile Trust Company of New York, this twenty-first day of February, one thousand eight hundred and eighty-eight.

THE MERCANTILE TRUST COMPANY.
By
LOUIS FITZGERALD,
President.

[SEAL]

Attest:
H. C. DEMING,
Secretary.

THE STATE OF NEW YORK, }
City and County of New York, } *ss.*

Before me, Thomas B. Clifford, a notary public in and for the city, county, and State aforesaid, this day personally appeared John C. Brown, who is personally known to me to be the person whose name is subscribed to the foregoing instrument, and to be first vice-president of the Texas and Pacific Railway Company, and acknowledged that he, as such vice-president, and by authority of said company, and as acting president (the president being now absent from the country), executed the same for said corporation and for the purposes and considerations therein expressed, and that the seal affixed thereto is the common or corporate seal of said corporation.

THOMAS B. CLIFFORD,

[SEAL] *Notary Public, City and County of New York.*

STATE OF NEW YORK, }
City and County of New York, }

BE IT REMEMBERED, That on the 20th day of Feb., A. D. one thousand eight hundred and eighty-eight, before me, the undersigned, Thos. B. Clifford, duly commissioned and authorized to take the acknowledgment and proof of the execution of deeds and other instruments of writing to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, &c., and to take and certify depositions, personally appeared the above-named John C. Brown, the vice-president and acting president (the president being now absent from the country), and C. E. Satterlee, the secretary of the Texas and Pacific Railway Company, and executed the above instrument of writing in my presence, and that of the two witnesses whose names are thereto subscribed as such; and thereupon said John C. Brown, as vice-president and acting president, and said C. E. Satterlee, as secretary of said Texas and Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed, for the consideration, uses, and purposes there mentioned, in their said respective capacities, and as the act and deed of said Texas and Pacific Railway Company.

And said Messrs. John C. Brown and C. E. Satterlee, being by me first duly sworn, did, each for himself, depose and say, that the said John C. Brown is the vice-president and acting president, and said C. E. Satterlee is the Secretary of the Texas and Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the board of directors, as and for the act and deed of said Texas and Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal of office, as commissioner aforesaid, at my office in said city of New York, on the day and date above written.

THOS. B. CLIFFORD,

[SEAL] *Commissioner of Deeds for the State of Louisiana in New York.*

STATE OF NEW YORK, }
City and County of New York, } ss.

BE IT REMEMBERED, That on the 20th day of Feb., Anno Domini one thousand eight hundred and eighty-eight, before me, the subscriber, a notary public in and for the City of New York aforesaid, personally appeared C. E. Satterlee, to me personally known, who, being duly affirmed according to law, deposes and says :—

That he is the secretary of the Texas and Pacific Railway Company, the corporation named in the above and foregoing indenture of mortgage; that he was personally present at the execution of the said indenture of mortgage, and saw the corporate seal of said company affixed thereto; that John C. Brown, the vice-president and acting president of the said company, did then sign, seal, and deliver the said indenture of mortgage as his act and deed and as the act and deed of said company, by virtue of the authority vested in him, as such vice president, and by a resolution of the board, to execute the same, and desire that the said indenture of mortgage might be recorded as such act and deed; that the seal so affixed is the common or corporate seal of the said company; that he, the deponent, at the same time signed his name to the said indenture of mortgage as a subscribing witness thereto, and, as said secretary, in attestation of the due execution and delivery thereof, and that the names of the said vice-president and acting president and of this deponent subscribed to the said indenture of mortgage, as aforesaid, are of their own proper and respective handwriting.

Affirmed and subscribed before me, the day and year aforesaid.

W. R. FIELD,
[SEAL.] *Notary Public for New York.*

C. E. SATTERLEE.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

BE IT REMEMBERED, That on the 25th day of February, A. D. one thousand eight hundred and eighty-eight, before me the undersigned, a notary public in and for the parish of Orleans, State of Louisiana, duly commissioned and authorized to take the acknowledgment and proof of the execution of deeds and other instruments of writing, to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, &c., and to take and certify depositions, personally appeared the above-named E. B. Wheelock, the president, and Robert Strong, the secretary of the New Orleans Pacific Railway Company, and executed the above instrument of writing in my presence, and that of the two witnesses whose names are thereto subscribed as such; and thereupon said E. B. Wheelock, as president, and said Robert Strong, as secretary, of said New Orleans Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed, for the consideration, uses and purposes there mentioned, in their said respective capacities, and as the act and deed of said New Orleans Pacific Railway Company.

And said Messrs. E. B. Wheelock and Robert Strong, being by me first duly sworn, did, each for himself, depose and say, that the said E. B. Wheelock is the president, and said Robert Strong is the secretary of the New Orleans Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the board of directors, as and for the act and deed of said New Orleans Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the board of directors.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed my seal of office, as notary public aforesaid, at my office in said city of New Orleans, on the day and date above written.

J. G. EUSTIS,
Notary Public.

[SEAL]

STATE OF LOUISIANA, }
City of New Orleans. }

Personally appeared before the undersigned, a duly appointed and qualified commissioner of the State of Texas, in and for the city and State aforesaid, the above-named E. B. Wheelock, the president, and Robert Strong, the secretary of the New Orleans Pacific Railway Company, and acknowledged in due form of law the aforegoing indenture to be their act and deed in their several capacities, and as and for the act and deed of the New Orleans Pacific Railway Company, and desired the same to be recorded as such. And said Robert Strong, being by me first duly sworn, did depose and say that he was personally present and did see the common or corporate seal of the above-named New Orleans Pacific Railway Company affixed to the foregoing indenture; that the seal so affixed is the common or corporate seal of said corporation; that the above-named E. B. Wheelock is the president of said corporation, and did sign the said indenture as such in the presence of deponent; that this deponent is the secretary of said corporation, and that the name of this deponent, within signed in attestation of the due execution of said indenture, is of this deponent's own handwriting, and that said indenture was signed by deponent as such secretary, and by said E. B. Wheelock, as president of the New Orleans Pacific Railway Company, under authority in them vested by the board of directors of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, as a commissioner of Texas, at New Orleans, Louisiana, this twenty-fifth day of February, in the year one thousand eight hundred and eighty-eight (1888).

(Signed) J. G. EUSTIS,

[SEAL] *Commissioner.*

Exhibit B.

EXPENDITURES MADE BY THE TEXAS AND PACIFIC RAILWAY COMPANY OUT OF ITS INCOME REMAINING AFTER PAYMENT OF ALL OPERATING EXPENSES, AS SHOWN BY ITS ANNUAL REPORTS.

(Interest on the Income Bonds not included below.)

Year Ended December 31, 1888:		
Interest on bonds	$916,791.67	
Rentals, interest, discount, etc.	73,460.78	
Taxes	143,213.00	
Expense prior to December 1, 1887	260,675.83	
Total		$1,394,141.28
Year Ended December 31, 1889:		
Interest on bonds	$1,279,490.00	
Taxes	173,116.89	
New equipment, including boats and barges	174,164.32	
Rentals and sundry expenses	109,664.62	
Total		$1,736,435.83
Year Ended December 31, 1890:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Taxes	188,360.75	
New Equipment	172,783.50	
Car Trust, Series B, due December 31st, 1890	131,000.00	
Real Estate, Terminal Property	86,600.00	
Sundry Expenses	26,074.36	
Total		$1,953,212.61

Year Ended December 31, 1891:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Car Trust Series "C"	131,000.00	
New equipment	11,987.80	
New buildings	69,314.53	
Taxes	190,129.22	
Sundries	13,174.95	
Total		$1,764,000.50
Year Ended December 31, 1892:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Interest and discount	16,050.94	
New equipment	146,638.05	
Taxes	193,265.33	
Cotton Wharf N. O.	28,488.00	
General office building	29,298.40	
Total		$1,762,134.72
Year Ended December 31, 1893:		
Interest on bonds	$1,279,490.00	
Rentals	68,904.00	
Interest and discount	22,223.20	
New Equipment	112,023.37	
Taxes	203,607.06	
Cotton Wharf N. O.	20,795.16	
Total		$1,707,042.79
Year Ended December 31, 1894:		
Interest on bonds	$1,279,490.00	
Rentals	93,835.06	
Interest and discount	15,442.62	
New equipment	31,568.85	
Land purchased	1,565.00	
Taxes	199,448.60	
Settlement in Southern Pacific suit and judgments in suits pending prior to reorganization	244,907.12	
Total		$1,866,257.25

Year Ended December 31, 1895:		
Interest on bonds	$1,279,490.00	
Rentals	72,393.60	
Interest and discount	9,625.49	
Land purchased	1,858.00	
Taxes	212,223.41	
Cars purchased and built	182,633.15	
Total		$1,758,223.65
Year Ended December 31, 1896:		
Interest on bonds	$1,279,490.00	
Rentals	72,393.60	
Interest and discount	8,932.29	
Buildings purchased	6,000.00	
Taxes	210,092.41	
Cars purchased and built	206,286.57	
Total		$1,783,194.87
Year Ended December 31, 1897:		
Interest on bonds	$1,279,490.00	
Taxes	208,640.01	
Rentals	72,393.60	
New Depot, East Dallas	8,154.74	
Land for depot purposes	1,253.00	
Judgments in suits prior to reorganization	14,067.65	
Sundry accounts uncollectible and cancelled in compromise suits	44,384.32	
Locomotives and cars purchased and built:		
Locomotives $109,677.57		
Cars 136,938.82		
New machinery 1,869.00		
	248,485.39	
Total		$1,876,868.71

Year Ended December 31, 1898:			
Interest on funded debt		$1,285,277.50	
Taxes		211,153.41	
Lease rentals		72,393.60	
Sundry expenses, suits prior to reorganization, etc.		26,414.06	
Compromise Westwego Fire suit		117,500.00	
Locomotives and cars purchased and built:			
Locomotives	$121,905.38		
Cars	532,483.18		
New Transfer Boat N. O.	65,935.45		
		720,324.01	
New Cotton Wharf Westwego		43,669.95	
New machinery for shops		7,827.12	
Total			$2,484,559.65
Year Ended December 31, 1899:			
Interest on funded debt		$1,283,865.00	
Taxes		249,344.29	
Compromise, Westwego Fire suit		96,437.47	
New depot and other buildings at Fort Worth		323,146.51	
New Equipment:			
Locomotives	$75,027.13		
Cars	87,139.12		
Other equipment machinery	19,952.50		
		182,118.75	
Total			$2,134,912.02

Year Ended December 31, 1900:			
Interest on funded debt		$1,289,755.82	
Taxes		276,328.08	
New Buildings		31,419.02	
New car shops, Marshall		121,321.32	
Miscellaneous		20,264.38	
New equipment:			
Locomotives	$183,928.26		
Cars	286,488.37		
Other equipment and machinery	11,884.98	482,301.31	
Total			$2,221,390.23
Year Ended December 31, 1901:			
Interest on funded debt		$1,393,814.17	
Taxes		291,483.64	
New buildings and shops		249,932.07	
New equipment		676,419.00	
Total			$2,611,648.88
Year Ended December 31, 1902:			
Interest on funded debt		$1,428,459.17	
Taxes		284,514.39	
Westwego fire claims		163,641.94	
Sundries		37,423.59	
Total			$1,914,039.09
Year Ended December 31, 1903:			
Interest on funded debt		$1,473,354.16	
Taxes		296,052.72	
Interest and discount		408,949.10	
Improvement		273,264.25	
Equipment		568,121.23	
Sundries		21,659.79	
Total			$3,041,401.25

Year Ended December 31, 1904:		
Interest on funded debt	$1,490,015.00	
Taxes	312,296.96	
Interest and discount	104,669.32	
Improvements	700,584.28	
Equipment	571,648.94	
Sundries	45,245.28	
Total		$3,224,459.78
Year Ended December 31, 1905:		
Interest on funded debt	$1,507,785.00	
Taxes	345,438.16	
Interest and discount	123,400.35	
Improvements	557,595.19	
Equipment	570,522.89	
Sundries	32,462.79	
Westwego fire claims	164,140.40	
Total		$3,301,344.78
Year Ended December 31, 1906:		
Interest on funded debt	$1,475,650.00	
Taxes	333,763.63	
Interest and discount	172,310.25	
Improvements	919,154.52	
Equipment	599,420.41	
Sundries	51,160.48	
Total		$3,551,459.29
Year Ended December 31, 1907:		
Interest on bonds	$1,493,625.00	
Taxes	604,099.73	
Interest and discount	188,488.85	
Improvement account	1,098,486.75	
Equipment account	1,128,249.45	
Sundry items	87,517.39	
Total		$4,600,467.17

Year Ended December 31, 1908:		
Taxes	$558,428.53	
Interest on bonds	1,498,500.00	
Interest and discount	331,330.03	
Improvement account	304,803.19	
Equipment account	600,784.61	
Sundry items	197,463.60	
Total		$3,491,309.96
Year Ended December 31, 1909:		
Taxes	$535,575.72	
Interest on bonds	1,498,500.00	
Interest and discount	323,866.43	
Improvement account	360,174.72	
Equipment account	660,413.79	
Sundry items	42,674.97	
Total		$3,421,205.63
Year Ended December 31, 1910:		
Taxes	$596,636.18	
Interest on funded debt	1,498,350.00	
Interest on equipment obligations	75,350.00	
Other interest	268,580.70	
Rentals	103,129.57	
Improvement and equipment account	1,220,599.55	
Total		$3,762,646.00
Year Ended December 31, 1911:		
Taxes	$664,815.14	
Interest on funded debt	1,498,400.00	
Interest on equipment obligations	135,737.50	
Other interest	231,218.27	
Rentals	127,227.12	
Hire of equipment balance	34,708.09	
Miscellaneous	43,020.36	
Improvement and equipment account	1,219,636.91	
Total		$3,954,763.39

Year Ended June 30, 1912:		
Taxes	$728,070.32	
Interest on funded debt	1,498,000.00	
Interest on equipment obligations	123,862.50	
Other interest	213,991.89	
Rentals	119,221.47	
Hire of equipment balance	180,693.45	
Improvements	597,517.67	
New equipment	751,529.01	
Total		$4,212,886.31
Year Ended June 30, 1913:		
Taxes	$693,441.21	
Hire of equipment	116,429.85	
Joint facility rent deductions	101,756.63	
Miscellaneous rent deductions	19,473.73	
Interest on funded debt	1,637,251.86	
Interest on unfunded debt	283,717.62	
Additions and betterments	1,352,183.05	
Total		$4,204,253.95
Year Ended June 30, 1914:		
Taxes	$757,340.98	
Hire of equipment	339,871.11	
Joint facility rent deductions	118,853.62	
Miscellaneous rent deductions	16,585.00	
Loss on separately operated properties	1,580.02	
Interest on funded debt	1,600,015.02	
Interest on unfunded debt	204,909.31	
Additions and betterments	641,568.93	
Maturing equipment obligations paid	466,500.01	
Total		$4,147,224.00

Year Ended June 30, 1915 :

Taxes		$856,136.10	
Uncollectible Railway Revenues		5,462.53	
Deductions from gross income:			
Hire of freight cars—balance	$475,091.39		
Rent for locomotives	4,131.37		
Rent for passenger train cars	47,807.11		
Rent for work equipment	731.98		
Joint facility rents	137,426.90		
Miscellaneous rents	19,139.25		
Miscellaneous tax accruals	14,364.23		
Loss on separately operated properties	5,330.92		
Interest on funded debt	1,575,354.55		
Interest on unfunded debt	221,947.81		
Maintenance of investment organization	452.90		
Miscellaneous income charges	10,919.11		
		2,512,697.52	
Additions and betterments		287,773.99	
Maturing equipment obligations paid		457,000.00	
Total			$4,119,070.14

101 *Motion to Dismiss of the New Orleans Pacific Railway Company.*

Filed January 31, 1916.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

In Equity. No. 2795-51.

BANKERS TRUST COMPANY, as Trustee, Complainant,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, Defendants.

Motion to Dismiss of the New Orleans Pacific Railway Company.

Now comes the New Orleans Pacific Railway Company, one of the defendants named in the above styled and numbered cause and moves the Court to dismiss this cause as to it and decree that this Court has no jurisdiction to maintain this cause of action as against this defendant within this District, to-wit: The Northern District of Texas, for the following grounds and reasons:

First. It says that this Court has no jurisdiction to maintain this cause of action as against it within this District, to-wit, The Northern District of Texas, in that it appears from complainant's bill that this defendant is a railway corporation chartered and existing under the laws of the State of Louisiana and is a citizen of the State of Louisiana and an inhabitant and a resident of
102 the Eastern District of Louisiana with principal and general offices located in the City of New Orleans, State of Louisiana, and it further appears from complainant's bill that this defendant has no substantial interest in the matters and things involved in the controversy herein and is not a necessary or proper party hereto.

Second. It further appears from the allegations in complainant's bill that this defendant neither has at this time nor did it ever at any time own, possess or have any interest whatsoever in any of the property of the Texas and Pacific Railway Company located in the Northern District of Texas or within the State of Texas.

Third. It further appears from complainant's bill that this defendant has no interest, right or possession in any of the property involved in this suit, situated within the State of Louisiana or elsewhere and it is not alleged or claimed in said bill that this defendant is claiming any right, title, claim, interest or possession in or to any of the property involved in this suit either in the State of Texas or in the State of Louisiana or elsewhere and it further appears from said allegations that this defendant is not in possession or control of any of said property either in the State of Texas or in the State of Louisiana or elsewhere.

Fourth. It affirmatively appears from the allegations of complainant's bill that whatever property it may have any time owned, claimed or possessed, as described in the said bill of complaint, was located wholly within the State of Louisiana, and it further affirmatively appears from said allegations that this defendant on or about the 20th day of June, 1881, sold and conveyed all of its rights, privileges, franchises and property described and involved in this suit, to its co-defendant, The Texas and Pacific Railway Company, and as alleged in said bill, all of said property, rights, privileges and franchises are now vested in and is absolutely the property of the defendant, The Texas and Pacific Railway Company, and that this defendant is not in possession of any of the said properties so described in complainant's bill and is not setting up any claim thereto in any manner whatsoever and it further affirmatively appears that the second mortgage bonds upon
103 which the complainant sues, were, on or about the 1st day of February, 1888, and long after this defendant parted with its title and possession to the property covered by said mortgage bonds.

Fifth. The allegations in the complainant's bill fail to show any state of facts which makes this defendant a proper or necessary party to this suit.

Wherefore defendant prays that this motion to dismiss be granted and its plea herein presented be sustained and that it be dismissed without costs.

GEORGE THOMPSON,
FLIPPIN, GRESHAM & FREEMAN,
Solicitors for Defendant, New Orleans Pacific Railway Company.

THOMAS J. FREEMAN,
Of Counsel.

104 *Motion to Dismiss of the Texas and Pacific Railway Company.*

Filed January 31, 1916.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

In Equity. No. 2795-51.

BANKERS TRUST COMPANY, as Trustee, Complainant,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, Defendants.

Now comes the Texas and Pacific Railway Company, one of the defendants named in the above styled cause, and moves the Court to dismiss the bill of complaint herein as to this defendant, upon each of the following grounds:

First. It appears from the complainant's bill herein that this Court is without jurisdiction to entertain this cause.

Second. The allegations of complainant's bill herein failed to allege a state of facts or any conclusions of law that give to this Court jurisdiction to entertain this cause of action as against The Texas and Pacific Railway Company.

Third. It appears from the allegations in complainant's bill herein that this Court is wholly without jurisdiction to hear and determine the issues involved or to render any binding or effective judgment herein.

Fourth. Because it appears from complainant's bill herein that this suit is not one between citizens of different states. It appears from the bill herein that the complainant is a resident and
105 citizen of the State of New York, the New Orleans Pacific Railway Company, a co-defendant herein, is a resident and citizen of the State of Louisiana and this defendant is a corporation incorporated under and by virtue of an Act of Congress of the United States.

Fifth. Because it further appears that the complainant is a citizen of the State of New York and the Texas and Pacific Railway Company is a corporation created under an Act of Congress of the United States and the New Orleans Pacific Railway Company is a corporation created under the laws of the State of Louisiana and a citizen and resident of the State of Louisiana and it further appears that the New Orleans Pacific Railway Company has no real or substantial interest in this cause, that no judgment is sought against the New Orleans Pacific Railway Company in any action of debt either upon the bonds sued upon herein or upon any interest alleged to be due upon said bonds. That complainant's bill shows that no part of the railway of this defendant in Texas and within the Northern District of Texas was ever owned by or claimed to be owned by the New Orleans Pacific Railway Company. That it appears from complainant's bill that the New Orleans Pacific Railway Company has no interest in the property involved in this cause. That it further appears from the complainant's bill that the New Orleans Pacific Railway Company never had any interest in the property of this defendant located in the State of Texas and within the jurisdiction of this Court and it further appears from the complainant's bill that whatever interest the New Orleans Pacific Railway Company may have had in the property and line of road of this defendant within the State of Louisiana or elsewhere, said New Orleans Pacific Railway Company has long since parted with said interest by due conveyance to this defendant and the said New Orleans Pacific Railway Company is not now claiming any interest in said property of this defendant either in Texas or in Louisiana. That the New Orleans Pacific Railway Company is not interested in the property involved in this litigation and is not a real party in interest hereto.

Sixth. It further appears from complainant's bill that this is not a civil suit or controversy arising under the Constitution of the United States or any law of the United States.

106 Seventh. Because complainant's bill fails to allege or show any facts which confer upon this Court jurisdiction to hear and determine the issues involved in this cause.

Eighth. It appears from complainant's bill herein that jurisdiction is sought to be obtained in this Court over The Texas and Pacific Railway Company solely upon the ground that such company is incorporated under an Act of Congress and this defendant states that this Court is without jurisdiction to entertain this suit upon such ground because and by virtue of the terms of an Act of Congress approved January —, 1915, which reads as follows: "No court of the United States shall have jurisdiction of any action or suit by or against any railway company upon the ground that such railway company was incorporated under an Act of Congress."

Ninth. Because complainant's bill fails to allege or show any facts which in law or equity would entitle the complainant to the relief or any part thereof as prayed for.

Tenth. It further appears from complainant's bill that if complainant has any cause of action, said cause of action is one at law and not in equity.

Wherefore for these and other good reasons appearing upon the face of complainant's bill, this defendant asks that this cause be dismissed.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
FLIPPIN, GRESHAM & FREEMAN,
Solicitors for the Defendant The Texas and Pacific Railway Company.

CHADBOURNE & SHORES,
Of Counsel.

107 *Back of Original Answer of Defendant, The Texas & Pacific Railway Company's Original Answer, Filed* 31 *Day of Jan.*, 1916.

No. 2795-51. In the District Court of the United States for the Northern District of Texas, Dallas Division. Bankers Trust Company, as Trustee, Complainant, against The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, Defendants. Answer of Defendant The Texas and Pacific Railway Co. (Original.) Filed 31 day of Jan. 1916. Louis C. Maynard, Clerk.

108 *Title Page of Defendant, The Texas & Pacific Ry. Company's Amendments to Its Original Answer, Filed Feb.* 16, 1916.

In the District Court of the United States, within and for the Northern District of Texas, Dallas Division. Bankers Trust Company, as Trustee, Complainant, against The Texas & Pacific Railway Company and New Orleans Pacific Railway Company, Defendants. In Equity No. 2795/51. Amendments of Defendant, The

Texas & Pacific Ry. Co. to its answer filed Jan. 31, 1916. Thomas J. Freeman, George Thompson, Flippen, Gresham & Freeman, Solicitors for Defendant, The Texas & Pacific Railway Company. Chadbourne & Shores, of Counsel. Filed 16 day of Feb. 1916. Louis C. Maynard, Clerk.

109 *Amended Answer.*

Filed Feb. 16, 1916.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

In Equity. No. 2795-51.

BANKERS TRUST COMPANY, as Trustee, Complainant,
against
THE TEXAS & PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, Defendants.

Amended Answer of the Defendant The Texas & Pacific Railway Company.

Now comes the Texas and Pacific Railway Company, one of the defendants named in the above styled cause and for answer thereto says:

That this Court is without jurisdiction as against this defendant to hear and determine the issues involved and that no cause of action is stated against this defendant for the following reasons:

I.

First. It appears from the complainant's bill herein that this Court is without jurisdiction to entertain this cause.

Second. The allegations of complainant's bill herein failed to allege a state of facts or any conclusions of law that give to
110 this Court jurisdiction to entertain this cause of action as against The Texas and Pacific Railway Company.

Third. It appears from the allegations in complainant's bill herein that this Court is wholly without jurisdiction to hear and determine the issues involved or to render any binding or effective judgment herein.

Fourth. Because it appears from complainant's bill herein that this suit is not one between citizens of different states. It appears from the bill herein that the complainant is a resident and citizen of the State of New York, the New Orleans Pacific Railway Company, a co-defendant herein, is a resident and citizen of the State of Louisiana and this defendant is a corporation incorporated under and by virtue of an Act of Congress of the United States.

Fifth. Because it further appears that the complainant is a citizen

of the State of New York and The Texas and Pacific Railway Company is a corporation created under an Act of Congress of the United States and the New Orleans Pacific Railway Company is a corporation created under the laws of the State of Louisiana and a citizen and resident of the State of Louisiana, and it further appears that the New Orleans Pacific Railway Company has no real or substantial interest in this cause, that no judgment is sought against the New Orleans Pacific Railway Company in any action of debt either upon the bonds sued upon herein or upon any interest alleged to be due upon said bonds. That complainant's bill shows that no part of the railway of this defendant in Texas and within the Northern District of Texas was ever owned by or claimed to be owned by the New Orleans Pacific Railway Company. That it appears from complainant's bill that the New Orleans Pacific Railway Company has no interest in the property involved in this cause. *That it further appears from the complainant's bill that the New Orleans Pacific Railway Company.* That it appears from complainant's bill that tdefendant located in the State of Texas and within the jurisdiction of this Court and it further appears from the complainant's bill that whatever interest the New Orleans Pacific Railway Company may have had in the property and the line of road of this defendant within the State of Louisiana or elsewhere, said New Orleans Pacific Railway Company has long since parted with said
111 interest by due conveyance to this defendant and the said New Orleans Pacific Railway Company is not now claiming any interest in said property of this defendant either in Texas or in Louisiana. That the New Orleans Pacific Railway Company is not interested in the property involved in this litigation and is not a real party in interest hereto.

Sixth. It further appears from complainant's bill that this is not a civil suit or controversy arising under the Constitution of the United States or any law of the United States.

Seventh. Because complainant's bill fails to allege or show any facts which confers upon this Court jurisdiction to hear and determine the issues involved in this cause.

Eighth. It appears from complainant's bill herein that jurisdiction is sought to be obtained in this Court over the Texas and Pacific Railway Company solely upon the ground that such company is incorporated under an Act of Congress and this defendant states that this Court is without jurisdiction to entertain this suit upon such ground because and by virtue of the terms of an Act of Congress approved January —, 1915, which reads as follows: "No court of the United States shall have jurisdiction of any action or suit by or against any railway company upon the ground that such railway company was incorporated under an Act of Congress."

Ninth. Because complainant's bill fails to allege or show any facts which in law or equity would entitle the complainant to the relief or any part thereof as prayed for.

Tenth. It further appears from complainant's bill that if complainant has any cause of action, said cause of action is one at law and not in equity.

For further answer, if so required, it says:

II.

It admits the allegations of Paragraph 1 of the bill of complaint to be substantially true as alleged.

III.

It admits as true so much of Paragraph 2 of the bill of
112 complaint as alleges that the Texas and Pacific Railway Company is a corporation duly created by and existing under the laws of the United States of America, that is, it admits it is a railway corporation created by and existing under the laws of the United States of America, it does not admit that its principal place of business and its principal operating and general offices are in the City of Dallas, State of Texas, in the Dallas Division of the Northern District of Texas, but does admit that one of its general offices and one of its principal operating offices is located in the City of Dallas, in the State of Texas, and in the Dallas Division of the Northern District of Texas. It further admits the allegations of Paragraph 2 to the effect that a material and substantial part of the railroads owned and operated by it are located in the Northern District of Texas, but it expressly denies that it is a resident and inhabitant of the said Dallas Division of the Northern District of Texas, and it now alleges that it is not a citizen of the State of Texas.

IV.

It admits the allegations contained in Paragraph 3 of complainant's bill as substantially true.

V.

As to the allegations contained in Paragraph 4 of complainant's bill, defendant says:

It admits the enactment by Congress of the Act approved on or about March 3, 1871, and the Act approved on May 2, 1872; it does not admit the allegations which are conclusions of law, that by virtue of said Acts or either of them, jurisdiction of this cause was conferred upon this Court and that this Court continues to have and still has jurisdiction thereof. As it is advised and believes, defendant says that this Court by virtue of the said Acts, has never had and does not now have jurisdiction of this cause and if mistaken in that, it says that if jurisdiction was ever conferred upon this Court to hear and determine issues as involved herein, that said jurisdiction was
taken away from this Court by virtue of an Act of Congress
113 approved January 28, 1915, which provided substantially as follows: "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress," and defendant now says that if jurisdiction was ever conferred upon this Court to hear and determine issues of the

kind involved in this cause, that said jurisdiction ceased and was withdrawn by virtue of the said Act of Congress aforesaid and defendant therefore submits that this Court is wholly without jurisdiction to hear and determine the issues. That this defendant is a railroad company incorporated under an Act of Congress and the provisions of the Act of Congress recited in Paragraph 4 of complainant's bill constitutes a part of the Charter of this defendant and the jurisdiction of this Court is invoked solely and alone in this cause upon the ground that this defendant was incorporated under an Act of Congress, to-wit: the Acts of Congress set forth in Paragraph 4 of complainant's bill. Defendant further says that the provision in said Act referred to, providing that the Texas and Pacific Railway Company as incorporated should be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States, was not intended to and did not give this Court jurisdiction of this cause.

VI.

It admits as true the allegations contained in Paragraph 5 of the bill of complaint.

VII.

It admits as true the allegations contained in Paragraph 6 of complainant's bill.

VIII.

It admits as true the allegations contained in Paragraph 7 of the complainant's bill.

114

IX.

It admits as true the allegations contained in Paragraph 8 of complainant's bill.

X.

It admits as true the allegations contained in Paragraph 9 of complainant's bill.

XI.

It admits the allegations contained in Paragraph 10 of complainant's bill are substantially correct, but it calls for the specific documents mentioned therein as being the best evidence of the terms and conditions embodied in the same. This defendant would aver, however, that the allegations contained in said Articles of Consolidation set forth in said paragraph 10, "That the franchises of the New Orleans and Pacific to be and remain a corporation" did not relate to its franchises to operate a railway, but only apply to its franchises over other property owned by it other than its railway properties and railway franchises, that all of its railway properties and railway franchises were conveyed to this defendant the Texas and Pacific Railway Company and this defendant has owned and possessed same and is now the owner and in possession of same since the date of said

Articles of Consolidation and said New Orleans Pacific Railway Company is not claiming any of the railway properties conveyed by it to said The Texas and Pacific Railway Company under said Articles of Consolidation nor any of the railway franchises conveyed by it to this defendant under and by virtue of said Articles of Consolidation.

XII.

It admits as true the allegations of fact in Paragraph 11 of complainant's bill.

XIII.

This defendant admits the allegations in Paragraph 12 to be substantially as alleged, but calls for the introduction of the
115 bonds therein mentioned and the mortgage therein mentioned as the best evidence of their terms and conditions, and it refers to the full statements and conditions set forth and contained in said bonds and in said mortgage for a full, true an- correct statement of all the provisions and restrictions therein contained.

XIV.

This defendant admits the allegations of Paragraph 13 to be substantially true, but calls for the introduction of the second mortgage and the bonds issued in pursuance thereof as the best evidence of their terms and conditions, and it refers to the full statements and conditions set forth and contained in said bonds and in said mortgage for a full, true and correct statement of all the provisions and restrictions therein contained.

XV.

This defendant admits the allegations contained in Paragraph 14 of complainant's bill as substantially true, but calls for the introduction of the mortgage as the best evidence of its terms and conditions and as containing a full, true and correct statement of all its terms and conditions.

XVI.

This defendant admits the allegations contained in Paragraph 15 of complainant's bill as true.

XVII.

This defendant is without knowledge of the facts contained in Paragraph 16 of complainant's bill.

XVIII.

Defendant admits the allegation of fact contained in Paragraph 17 of complainant's bill, but does not admit the conclusions
116 of law or the inferences drawn therefrom, and it refers to the said second mortgage itself as evidencing all of its terms, conditions and obligations.

XIX.

Defendant admits that since the date of execution and delivery of the second mortgage, Exhibit A to complainant's bill, it has from time to time acquired certain other property, real and personal, but on information and belief it denies that said property so acquired became subject to the lien of said second mortgage, and it denies the right of the complainant herein to require of this defendant an accounting for all such property or any part thereof, and demands strict proof that all or any part of such property subsequently asquired was subject to the lien of said second mortgage.

XX.

This defendant admits that a large amount of the twenty-five million dollars face value of the income bonds covered by said second mortgage, as mentioned in Paragraph 19 of complainant's bill, were duly authenticated by the Mercantile Trust Company, but it denies that the entire twenty-five million dollars face value of said income bonds are now outstanding. It avers as a fact that said second mortgage bonds to the extent of three hundred twenty-three thousand eight hundred and seventy-five ($323,875.00) dollars are not outstanding, but are still held in the treasury of this company. Defendant is without knowledge as to whether the bonds issued are now outstanding in the hands of bona fide holders for value.

XXI.

This defendant admits the allegations contained in Paragraph 20 of complainant's bill as substantially true, but calls for the introduction of the documents therein mentioned as the best evidence of the facts therein recited.

XXII.

Answering the allegations and statements made in Paragraph 21 of complainant's bill, defendant says: it does not admit that
117 the interest on the income bonds commenced to accrue on the 1st day of December, 1887, but denies same. Defendant admits that subsequently to the 1st day of December, 1887, and for each annual period thereafter ending December 1st it did receive amounts of income remaining after the payment of its total operating expenses as will be more fully and completely hereinafter shown. Defendant is not advised as to what is intended to be meant in the allegations in said paragraph 21 where it is averred that it received large amounts of income remaining after the payment of total operating expenses, and defendant is not to be understood as admitting any statement or conclusion of the complainant as to what is meant by the payment of its total operating expenses, as will be more fully hereinafter explained. Referring to the allegation in said Paragraph 21 as to what the annual reports of the board of directors to the stockholders of this defendant show, defendant says that said reports are the best evidence of the statements therein made, and it calls for the

introduction of same. Defendant denies the allegation that said annual reports for the annual period ending December 31st for the years 1888 to 1911 inclusive and for annual periods ending June 30th for the years 1911 to 1915 inclusive, are correctly stated in said allegations. It is alleged that for the year ending December 31, 1888, that said report shows an income remaining after the payment of all operating expenses the sum of $1,576,866.21. Defendant says that this is untrue. It avers that said annual report for the year ending December 31, 1888, shows that the total gross income from all sources for said year amounted to $6,374,386.27, and it further shows that there was added to the said income the sum of $130,936.21, which defendant avers to have been brought forward from the year ending December 31, 1887, so that there was a total gross income of all kinds at the end of the year December 31, 1888, the sum of $6,505,322.48. Said report shows, which defendant avers to be a fact, that the actual operating expenses were $4,928,556.27. By taking the amount named as the total income as stated and taking therefrom the actual operating expenses as stated, the amount of $1,576,868.21 is left. Defendant, however, denies as alleged in said Paragraph 21 that this is the income remaining after the payment of all operating expenses. According to the report and which is herein
118 averred to be true, there was paid out additional sums as follows:

For taxes	$143,213.00
Interest on first mortgage bonds	915,791.87
Other expenses	260,675.83
Rentals	75,460.78
Leaving a balance stated in the report as applied to betterments of	182,724.93
Making a total of	$1,576,866.21

Defendant avers that in truth and fact, that of the amount stated as applied to betterments there was the sum of $179,138.75 actually used and spent for betterments, leaving a net income of $3,586.18 on December 31, 1888, all of which will more fully be shown at the hearing of this cause. Concerning the allegation made in said Paragraph 21 that for the year ending December 31, 1889, there remained as income after the payment of all operating expenses as shown by said reports the sum of $2,023,769.85, defendant says that same is not true. In explanation of said allegation on the part of the complainant it is here stated that complainant in arriving at this statement, took from the report the actual gross income from freight, passenger, mail, express and miscellaneous amounting to $6,917,802.84; from this it deducted actual operating expenses as shown in said report in the amount of $5,072,942.10, thus leaving a balance of $1,844,860.74. To this sum complainant adds the additional sum of $178,909.11 in order to arrive at the statement that $2,023,769.85 was the total net income as claimed. Defendant avers as a fact that there was included in this item $178,909.11 as of net income derived

from the operation of the road for the year ending December 31, 1888, when in truth and fact said certain income for the year 1889 was $175,322.93, which would make the true income with the exceptions hereinafter stated the sum of $2,020,183.67. Defendant avers, however, and as shown by the report there was paid out for taxes, interest on bonds, new equipment, rentals and sundry expenses, the sum of $1,736,435.53, which left the actual balance of $283,748.14, instead of the amount shown. As to the allegations of the income for the year ending December 31, 1890,

119 defendant says that this is true subject to the statement that complainant only took into account the gross operating rental and other income and only deducted the actual expense of operation and did not take therefrom any other expense or expenditure, when in truth and fact there should have been deducted from same the amount paid out as interest on the first mortgage bonds, rentals, taxes and other expenses as shown by said annual report, so that there was in truth and fact left after making such expenditures a net income of $249,662.54, and defendant here avers that for and during said year it spent in additions and betterments and reserved for additions and betterments, which it alleges it had a lawful right to do, the sum of $395,763.22, so that in truth and fact there was a deficit of operation as stated for the year ending December 31, 1889, the sum of $146,690.83. The allegation made in said Paragraph 21 as to the amount of income for the year ending December 31, 1891, and as shown by the reports, defendant says that the same is true subject to qualification and explanation that complainant took into account only the gross operating, rental and other income and only deducted the actual expenses of operation and did not take therefrom any other expenses or expenditure which should have been deducted, such as interest on bonds, amounts expended for rentals, taxes and other expenses as shown by said annual report, so that in truth and fact, after deducting all of such charges there was left the sum of $33,019.80 and not the amount stated by complainant. As to the right and power of the defendant to make said expenditures and payments, reference will be had to allegations to be hereinafter made. Subject to qualifications and explanations hereinafter made, defendant says that the amount of income for the years ending December 31, 1892, to December 31, 1911, inclusive, and for the years ending June 30th, 1912, to June 30th, 1915, inclusive, are substantially correct, though defendant reserves the right to test the accuracy of any of the figures stated. Defendant, however, denies the allegation that the amount stated represented an income remaining after the payment of all operating expenses for the respective years. Defendant says that there should have been deducted from the gross income for each particular year the amount expended for taxes, interest on first and second mortgage bonds, as

120 same was expended, and all other necessary and proper expenses as shown by said reports, and defendant here now states that if all proper expenditures, payments and reserva-

tions had been deducted from said gross income, the true balances for each respective year would have been as follows:

Year ending December 31, 1888, Surplus	$3,586.88
Year ending December 31, 1889, Surplus	283,748.14
Year ending December 31, 1890, Deficit	146,690.68
Year ending December 31, 1891, Surplus	33,019.80
Year ending December 31, 1892, Surplus	143,457.11
Year ending December 31, 1893, Surplus	527,097.43
Year ending December 31, 1894, Surplus	268,335.94
Year ending December 31, 1895, Surplus	154,971.83
Year ending December 31, 1896, Deficit	6,011.86
Year ending December 31, 1897, Surplus	447,969.15
Year ending December 31, 1898, Surplus	31,152.64
Year ending December 31, 1899, Surplus	446,982.84
Year ending December 31, 1900, Surplus	762,277.70
Year ending December 31, 1901, Surplus	557,457.41
Year ending December 31, 1902, Deficit	1,651,155.70
Year ending December 31, 1903, Deficit	223,177.67
Year ending December 31, 1904, Deficit	75,066.82
Year ending December 31, 1905, Deficit	30,763.74
Year ending December 31, 1906, Surplus	330,433.92
Year ending December 31, 1907, Deficit	629,992.51
Year ending December 31, 1908, Deficit	598,332.76
Year ending December 31, 1909, Surplus	688,648.02
Year ending December 31, 1910, Surplus	695,760.34
Year ending December 31, 1911, Surplus	188,947.50

Defendant denies the statements as to the income balance for the years ending June 30, 1912, 1913, 1914 and 1915. Defendant says and as will be more fully and completely shown on the hearing of this cause, that for the year ending December 31, 1912, after deducting from the gross income all proper expenditures, charges and credits and amounts expended for additions and betterments there was a deficit left of the sum of $1,397,696.37 and that likewise for the year 1913 there was a balance left of $85,967.94 and for the year 1914 there was a balance of $165,441.36, and for the first eleven months of the year 1915 there was a deficit of $833,816.85. Defendant here avers that on the hearing of this cause it will produce its books or true and correct statements therefrom showing fully and completely the amounts of its gross income and the amount of its true and lawful expenditures, and it avers that said balances will appear substantially as alleged in this answer and will not be as complainant has in its bill alleged, and defendant here now expressly denies any allegation of complainant that is not in accordance with the facts as alleged herein by this defendant. If it be true that the interest-bearing period of said second mortgage bonds began on the 1st day of December, 1887, which is not admitted but denied, or if it be true that the interest-bearing period on said mortgage bonds was from the 1st day of December of any particular year to the 1st day of December

121

of the year following, defendant says that as it is informed and believes, it will be necessary to have a statement of the financial accounts of this defendant for each period beginning December 1st, 1887, and ending December 1st, 1888, and for each annual period thereafter, and defendant says that it will have a statement of said kind made and produced at the hearing of this cause. As will be seen from the reports of the directors made to the stockholders and referred to in complainant's bill, the practice and custom has been to make a statement of the financial affairs of this company for a yearly period beginning from the 31st day of December of each year to the 31st day of December of the succeeding year up to and including the year ending December 31, 1911, and after that reports were made of the fiscal affairs of said company ending June 30th of each year. Defendant here says that neither this complainant nor its predecessors nor any holder or owner of said second mortgage bonds or any of them has or have ever demanded of this company a statement of its fiscal affairs for periods running from December 1st to December 1st of the next succeeding year, but said statements and reports and accounts have been made in annual periods for the calendar years ending December 31st until the year 1912, when said statements were made for the fiscal years ending June 30th. Defendant says that since the filing of this bill and the service of processes upon it it has not had the time to prepare statements and exhibits showing the income and expenditures for the years ending December 31st of each year, but it says that it will have same prepared and will produce same at the hearing of this cause. Defendant is not now prepared to say
122 what substantial difference, if any, there will be with reference to incomes, expenditures and balances treated as of the year ending December 1st, as compared with the manner in which said accounts have been stated, but it says upon information and belief that the net balance will be substantially the same though it reserves the right to show the true and correct balances for each particular year. It denies, however, the allegation in Paragraph 21 that it received during each annual period of the income bonds ending December 1st of each year a large amount of income remaining after the payment of its total expenses. Defendant admits upon belief and information that it did receive during each annual period from the 1st day of December, 1887, and down to the present, certain amounts of income over and above the payment of total operating expenses, the exact amount, as hereinbefore stated, defendant is not prepared to say, but in this connection it expressly avers that after taking from said income all of its operating expenses, taxes, betterments, improvements and all expenditures and credits which it was legally entitled to make and deduct, that the amounts will not be as stated by complainant.

Defendant says that in its statements herein made as to expenditures, deductions, surplus, deficit and net income, it has reference to the statements made in the printed annual reports. Defendant says in truth and fact said annual reports do not show all of the expenditures made from time to time, and do not show, in all instances,

the true and correct balance, or the true and correct deficit. It says that in various and sundry years large sums of money are expended by this Defendant for improvements, betterments, equipments and various and sundry other items and accounts, and for which expenditures this Defendant was entitled to deduct and has deducted from its gross income before any income bondholders should be paid anything on account of interest on said bonds.

Defendant says the allegations made in this paragraph concerning income, net income, surplus and deficit, *has* reference to the said printed annual reports, and it is not to be understood as admitting that the surplus, income or net income, or deficit referred to in the printed annual reports are the actual facts as same existed, but says that there should be deducted from the gross in-
123 come various other additional amounts which were properly expended and should be properly deducted from the gross income.

XXIII.

This defendant admits as true the allegations contained in Paragraph 22 of the bill of complaint and states that with the exception of interest therein set forth as paid, no interest was due or payable upon said bonds according to their terms and effect and no interest was declared to be due and payable thereunder by the board of directors as is provided in said second mortgage.

XXIV.

Defendant denies the allegation in Paragraph 23 of the bill that at the expiration of each of the annual interest periods of the income bonds for the years therein mentioned below, there remained in possession of this defendant out of said income after payment of all expenditures and charges, a surplus consisting of large sums of money. Defendant says that a true and correct statement of the accounts of this company will show that for the years ending December the 1st of each year beginning December 1st, 1888, down to the present time, that for some of said years there was a surplus and for other of said years there was a deficit. Defendant, as hereinbefore explained, has not had its reports made for the years ending December 1st, but as hereinbefore set forth. Defendant, however, at the hearing of this cause will furnish its books or a true and correct statement or statements of same showing the surplus, if any, for each particular year and the deficit for each particular year ending December 1st instead of December 31st, but it here now states that full and complete payments have been made to the holders of the second mortgage bonds of all sum or sums to which said holders were entitled. Referring to the allegation in said Paragraph 23 as to the contents of the annual reports of the board of directors and the amount shown therein as a surplus remaining in the possession of the defendant company at the expiration of each annual period ending December 31st, for the years mentioned in said Paragraph

23 and for the years ending June 30th, for the years men-
124 tioned in said Paragraph 23, defendant says: it denies that the amount of the surplus for the year ending December 31, 1888, was as stated, to-wit: $182,724.93, and it denies that the amount of surplus for the year ending December 31st, 1889, was for the sum of $287,824.00. As in this answer hereinbefore stated, the truth and fact is that the surplus for the year ending December 31, 1888, was the sum of $3,586.18, and for the year 1889 was $283,748.14. The amount stated for the year ending December 31st, 1891, is correct. The same is true for the years ending December 31, 1893, 1894, 1895, 1897, 1898 and 1899. It denies the allegation that for the year ending December 31st, 1900, there was a surplus of $1,137,277.70. The true surplus for that year *and* as shown by the said annual reports was the sum of $762,277.80. The difference between the amount stated by complainant and the amount herein stated is apparent when it is considered that complainant failed to deduct from the surplus as claimed by it the sum of $375,000.00, the amount paid out as interest on the second mortgage bonds. It denies the statement as to the surplus appearing to be on hand for the year ending December 31st, 1901. The true amount of surplus for said year was $557,457.41. The same explanation is made as to the difference. In other words, compla-nant did not deduct the sum of $929,520.00, the amount paid out as interest on the second mortgage bonds. Defendant expressly denies the allegation that the reports show that for the year ending December 31st, 1902, there was a surplus of $1,718,102.00; further defendant says that in truth and fact there was a deficit for said year in the sum of $1,651,155.70. It alleges that complainant failed to deduct from the proper gross incomes, expenditures for betterments and improvements and amount paid out as interest on the second mortgage bonds. If complainant had made these deductions there would have been a deficit in the amount stated. It denies the allegations as to the surplus for the year 1903. Said annual reports, when produced, will show that in truth and fact there was a deficit of $223,177.67. Complainant failed to deduct from the gross income the amounts paid out as interest on the second mortgage bonds. It denies the correctness of the amount stated to be on hand as a surplus for the year ending December 31, 1904. In truth and fact there was a deficit of $75,066.82, as fully appears from said reports.

It denies the statement that for the year ending December 31,
125 1905, there was a surplus of $1,203,042.51. It avers it to be a fact and said annual report shows that in truth and fact there was a deficit of that particular year in the sum of $30,763.74. It denies that there remained the amount of surplus stated for the year ending 1906. It avers that the true surplus for said year was the sum of $330,436.92, as appears, and further that same is so shown by said annual report. For the year ending December 31, 1907, it denies that there was a surplus of $603,813.74, but to the contrary and in truth and fact and as shown by said report there was a deficit of $629,992.51. As to the year 1908 denial is entered that there was a surplus of $265,014.98, but in truth and fact and

as appears from said annual report there was a deficit for that year of the sum of $898,649.02. The surplus for the year 1909 is correctly stated; also for the year 1910. For the year ending December 31st, 1911, it avers that the true surplus as shown by said report is the sum of $188,947.50 and not the amount stated. For the year ending June 30th, 1914, it admits that said reports show a surplus in the possession of this defendant for said fiscal year in the amount stated. As to the allegation that for the year ending June 30th, 1915, there was a surplus remaining in the sum of $252,652.57, defendant says that said allegation is not correct and it denies same. In explanation thereof it says that said report does show that after accounting for all operating income and all operating revenues and deducting therefrom all expenditures for said year there was an income balance shown by said report of the sum alleged. Defendant, however, avers that as against said income balance there is properly chargeable the sum of $997,594.34 on account of profit and losses, which is properly chargeable as against the income for said year. It therefore alleges that for the said year ending June 30th, 1915, there was in truth and fact a deficit in the sum of $745,541.80. It will be observed that complainant has carefully omitted references to the reports for certain years as shown in the allegations contained in Paragraph 22 of this answer hereinbefore made when there was an actual deficit and it refers to the statement therein made for proof thereof. Referring to the further allegations contained in said Paragraph 23 to the effect that on the 1st day of December preceding each 31st day of December or succeeding each 30th
126 day of June, as the case may be and as mentioned in said Paragraph 23, there remained in the possession of the defendant Texas Company a surplus computed by making like deductions as were made in the annual reports for the corresponding year a sum equal to or in excess of the surplus reported as aforesaid for the year ending on the 31st day of December or the 30th day of June of each year as the case may be, defendant says that it does not admit said allegation, but denies same. For reasons hereinbefore stated it is not at the present time able to state what the exact surplus would be, if any, for any particular year so ending, or what deficit there would be for any particular year as mentioned, but it says that it will produce its books or correct statements therefrom showing the amount of surplus, if any, or the amount of deficit, if any. It says, however, upon information and belief that a statement for the annual periods referred to will show that the surplus, if any, will not exceed the surplus shown for the particular years ending December 31st or on the 30th day of June as contained and set forth in said report. Defendant admits that for none of the years ending December 1st was any payment made to any of the holders of income bonds other than the amount named, to-wit: $9,430,290.00. Defendant does not admit that the sum stated, to-wit: $375,000.00 and $929,520.00 paid out as interest on the Second Mortgage Bonds was paid out of the surplus for the particular year ending December 31, 1899, and December 31st, 1900; but as shown by the reports for the respective years this is not true and said allega-

tions are hereby denied. It expressly denies that the interest payments as shown in the reports for the years ending December 31, 1901, to December 31, 1907, were paid out of net income for the particular years on account of the interest for said particular year. This is apparent from said annual reports and from allegations hereinbefore made. It also denies the allegations that the interest payment made on account of the bonds for the interest accruing or claimed to have accrued for the period ending December 31st, 1907, was paid out of the net income for said year. The full and particular facts with reference to same will be hereinafter more specifically set forth. Defendant expressly denies that there did accrue during the annual interest periods of the second mortgage bonds ending
127 December 1st, in the calendar years mentioned, a sum equal to or in excess of $4,177,856.58 over and above the amounts actually paid out as interest on the second mortgage bonds, but in truth and fact expressly avers that no surplus in any manner whatsoever has arisen during my interest-bearing period of said income bonds over and above the amounts actually paid out, and defendant does not admit that the amounts paid out as interest for the respective years represented any surplus of net income for the particular year, but to the contrary denies that same is true.

XXV.

Defendant expressly denies that there exists or has ever existed any surplus sum or sums aggregating the amount named, to-wit: $4,177,856.58, which were and are properly applicable to the payment of interest on said income bonds in accordance with the terms of the second mortgage, as will hereafter more fully appear and be shown according to the terms and stipulations of the said mortgage. No such surplus of same or any part of same, as alleged, has ever existed or now exists, which complainant or any other person is entitled to have applied to the payment of interest on said income bonds. It expressly denies that the board of directors of this company have wrongfully, in violation of the rights of complainant or of the holders of the said income bonds, neglected and refused to determine that said alleged surplus sums were net income applicable to the payment of interest on the income bonds and that they have wrongfully and in violation of the right of complainant and of said holders determined that said surplus sums were not net income so applicable. To the contrary, it would aver that no said sum has ever existed and avers that said board of directors had no power or right to apply any sum or sums whatever to the application of interest on said second mortgage bonds, save and except such as has been actually paid out, and defendant does not admit the full right of the said board of directors to order same. It avers that the said board of directors in declining, failing and refusing, if it has failed and refused to make any additional payments of interest on said second mortgage bonds, acted fully within its powers and to have acted otherwise would have been a gross

breach of the duties and authority conferred upon them.
128 Defendant will here say that, although the holders of said mortgage bonds have from time to time, and at all times, been fully apprised of the actions of the board of directors in determining what sums, if any, should be paid out as interest on said bonds, neither the complainant or its predecessors, nor any holder of said mortgage bonds, has requested or demanded of said board of directors or any other officer of this company any additional payment or payments of interest out of any of the earnings or money of this defendant, and the filing of the bill herein is the first information that complainant or any bondholder or bondholders was setting up any right, claim or demand to have any additional sums paid to them out of any moneys or earnings of this company.

XXVI.

As to the allegations in Paragraph 25 of complainant's bill this defendant admits that it paid out of its income remaining after payment of all operating expenses, interest at the rate of 5 per cent. per annum upon its first mortgage bonds, outstanding under and secured by a first mortgage on its property, said amount of said first mortgage being approximately twenty-five million dollars. It admits that it paid interest at the rate of 6 per cent. per annum upon the bonds outstanding under a mortgage on its eastern division in said first mortgage referred to and interest upon the Texas School Fund Loan at the rate of 6 per cent. per annum. It admits that the allegation in said bill that the aggregate principal amount of its bonds outstanding under its said first mortgage and under its eastern division mortgage together with the School Fund Loan, was substantially for the sum of twenty-five million dollars. It admits the allegation in the complainant's bill that the aggregate principal amount of bonds secured by a mortgage on its eastern division has not since December 1, 1887, exceeded approximately the amount of $3,784,000.00 and that the principal amount of said School Fund Loan has at no time since December 1, 1887, exceeded approximately the amount of $167,000.00. It avers that all of its eastern division bonds were paid and cancelled prior to December 31, 1905. It denies that said School Fund Loan was paid
129 on or before December 31, 1888, but avers that same was finally paid off during the year ending December 31, 1898, as will be fully shown by the records of the company. It admits that no bonds were outstanding between December 1, 1887, and December 31, 1898, issued in accordance with the branch line provision of its first and second mortgage, and it admits that the principal amount of such branch line bonds now outstanding does not exceed the sum of $4,970,000.00. It does not admit that the maximum annual interest charge upon all the issues of bonds described in Paragraph 25 other than income bonds at any time prior to December 31, 1898, exceeded $1,289,510.00, but states that this amount is approximately correct. It does not admit that the maximum annual interest charge on such bonds other than income

bonds have not at any time since December 31, 1898, exceeded $1,538,000.10, but states that this amount is approximately correct, but that the records of the company are the best evidence of these details and same will be relied on and will be furnished and produced at the hearing of this cause. It admits that it has paid a large sum for taxes on the property covered by the second mortgage. This defendant expressly denies, however, that in addition to the sum specified as surplus in Paragraphs 23 and 24 of complainant's bill, the entire income of this defendant remaining after payment of its operating expenses and all interest payable on the bonds other than income bonds in said paragraphs mentioned and of all taxes upon the property subject to the lien of the second mortgage, was or is properly applicable to the payment of interest on the income bonds up to the rate of 5 per cent. per annum or at any other rate. This defendant further admits that with the exception of the interest paid on said income bonds no income remaining has been applied or paid upon same. For reasons which will be hereinafter more fully and completely stated it avers that if any such income remained and has been expended by this defendant, same was expended properly and lawfully and in full accordance with the terms and conditions of said income bonds and said second mortgage securing same and same was not in anywise applicable to the payment of any interest on said income bonds under and by virtue of the terms of said second mortgage securing same. It expressly denies that amounts paid out by it, if any, are correctly set forth in Exhibit B of complainant's bill. It admits that it has paid out from the earnings on its property, interest on the funded debt, interest on the unfunded debt, interest and discount on the current indebtedness, taxes, additions and betterments to property and equipment and for the various other purposes specified in this section, including taxes upon the property subject to the lien of the second mortgage, but it states and avers that it had a lawful right to make said expenditures, and that same were made in strict accordance with the provisions of said income bonds and said second mortgage, and it expressly denies that said expenditures constituted a wrongful diversion and misapplication of any net income of this defendant applicable up to the rate of 5 per cent. per annum to the payment of the interest on said income bonds, and it expressly denies that said payments and expenditures were in violation of any of the rights of the complainant herein or the holders of the income bonds secured by said second mortgage. It expressly denies that the board of directors of this defendant wrongfully and in violation of the rights of the complainant herein or of the holders of any of the income bonds secured by said second mortgage, neglected and refused to determine that said amounts of income alleged to be diverted and misapplied were not incomes applicable to the payment of interest on said income bonds, and it expressly denies that said board of directors wrongfully and in violation of the rights of this complainant or of the holders of any of the income bonds, determined that said income so alleged to be diverted and misapplied was not net income ap-

130

plicable to the payment of the interest on the income bonds. This defendant expressly denies that it has diverted or misapplied any income from any source that should have been applied to the payment of the interest on said income bonds secured by said second mortgage under the terms and conditions of said mortgage.

XXVII.

This defendant expressly denies each and every allegation contained in Paragraph 26 of complainant's bill and further expressly denies that there ever existed any surplus sums aggregating $4,177,856.58.

131 XXVIII.

Defendant answering the allegations contained in Paragraph 27 of said bill admits that it did not make payments of interest on the dates specified in said paragraph and in the amounts so specified. It denies that the amounts so specified and claimed were ever payable out of the net income of this defendant as defined and provided in the second mortgage, but to the contrary it expressly avers that no such indebtedness for interest ever existed and it further avers that this defendant never at any time became liable to the complainant or any holder of said income bonds for said sums so named and specified in any part of same. Defendant further expressly denies that there ever existed any surplus sums aggregating or in excess of the amount named, to-wit: $4,177,856.58, and it denies that the reason of its failure and refusal to apply such alleged surplus to the payment of interest on the said income bonds was that default was made by this defendant in the payment on the dates therein specified of interest in the amounts or in excess of the amounts so specified or in any other amount whatsoever, and it expressly denies any allegation therein contained that this defendant at any time or in any manner ever defaulted on account of any interest payment properly due upon said income bonds, and it denies that any default has occurred which would entitle the complainant or any holder of the said second mortgage bonds to recover the amounts of said interest so specified or any part thereof or any interest upon such interest as claimed. It denies that any such default was ever made, and it expressly denies that any such default still continues. As to the allegations contained in said Paragraph 27, reading as follows:

"That by reason of the failure and refusal of the defendant Texas Company to apply to the payment of interest on the Income Bonds, the amounts of its net income applicable thereto and diverted as hereinabove alleged in paragraphs XXV and XXVI hereof, further default was made by the defendant Texas Company on the dates specified above as the due dates of the instalments of interest on the Income Bonds which remain unpaid, in amounts unknown to your orator but which, as your orator is informed and believes,

132 are equal to or in excess of the amounts set forth in Exhibit B hereto annexed and alleged in paragraphs XXV and XXVI

hereof to have been diverted out of the income of the defendant Texas Company during the respective annual interest periods immediately preceding said respective due dates."

Defendant expressly denies each and every fact therein alleged and says that said allegations are not true. This defendant expressly denies that it has ever failed to provide any funds at the dates or at the places where interest was due and payable upon the income bonds in accordance with the terms thereof and of the second mortgage, and it further expressly denies that it has failed to provide elsewhere any funds with which to pay any part of such interest. That it has at all times, where interest was due and payable on said income bonds under the terms of said second mortgage, made provision for the payment of same and same has been fully paid. As to the allegation that on and prior to the due dates of the respective instalments of interest thereon the holders of substantially all of the income bonds were informed that this defendant had not and would not have any such funds at such place or elsewhere for the purpose of paying such interest, defendant says same is true and avers that such information was given for the reason that such interest was not payable under and by virtue of the terms and provisions of the said second mortgage bonds. Defendant denies that the said second mortgage bondholders or any of them were informed that the board of directors of this defendant had neglected and failed to determine that this defendant had received net income available for or applicable to such payments. To the contrary it avers that the complainant and its predecessor, as trustee of the said second mortgage bondholders were informed that the said board of directors of this defendant acting in pursuance of the powers and authority granted to them under the terms of said second mortgage had determined that no net income was available for or applicable to such interest payments. It denies that the facts relative to the existence of such net income were peculiarly within the knowledge of this defendant and its board of directors, but to the contrary it expressly avers that the trustee for said second mortgage bondholders had full
133 knowledge of all of the facts relative to the existence of any net income or non-existence of any income applicable to the payment of the second mortgage interest or by the exercise of proper care and diligence on its part could have had full knowledge pertaining to same. It further expressly avers that all of said second mortgage bondholders and especially the St. Louis, Iron Mountain and Southern Railway Company, who claim to own $23,703,000.00 of the principal amount of said income bonds, had full knowledge of all of the facts in connection with the fiscal affairs of the said Texas and Pacific Railway Company or could by the exercise of reasonable diligence become possessed of said knowledge and information and were fully advised of the action and determination of this defendant through its board of directors that no net income was available or applicable to the payment of interest upon said second mortgage bonds save and except such interest as was paid. These allegations are sustained by the allegations of complainant's bill to the effect that the St. Louis, Iron Mountain and Southern Railway Company

owned about 90 per cent. of said income bonds and that a large amount of the balance was owned by officers, directors and stockholders of this defendant, and the further allegation that a considerable number of the officers and directors of this defendant have at all times prior to March, 1915, been officers and directors of the holder of 90 per cent. of said income bonds, to-wit: the St. Louis, Iron Mountain and Southern Railway Company. Defendant avers further that the defendant has no information as to whether the bonds helds by the St. Louis, Iron Mountain and Southern Railway Company are subject to a pledge, but says if same be true that the party holding said bonds under a pledge had full knowledge of all the facts connected with the fiscal affairs of The Texas and Pacific or with the exercise of reasonable care could have known same. Defendant has no information as to whether all or nearly all of the remainder of the Iron Mountain bonds have for years been owned by the officers, directors and large stockholders of said defendant. It denies on information and belief that the St. Louis, Iron Mountain and Southern Railway Company is insolvent and calls for strict proof of this allegation. It admits that the properties of the St. Louis, Iron Mountain and Southern Railway Company have been placed in the hands of a receiver and that proceedings have
134 been commenced for the foreclosure of its mortgage known as the first and refunding mortgage and that the bonds secured by said mortgage aggregating more than twenty-nine million dollars have been declared due and payable, but on information and belief it states that there was no reason why said bonds should have been declared in default as on information and belief it avers that said St. Louis, Iron Mountain and Southern Railway Company was a solvent corporation. It states, however, that the records of the United States Circuit Court at St. Louis shows that the parties in charge of the St. Louis, Iron Mountain and Southern, to-wit: B. F. Bush, as President, permitted said St. Louis, Iron Mountain and Southern Railway Company to be placed in the hands of a receiver for the non-payment of a debt for supplies aggregating only a few thousand dollars and upon information and belief it charges that said St. Louis, Iron Mountain and Southern Railway Company should not have been placed in the hands of a receiver, that it had property and assets more than sufficient to have met the claim upon which it was placed in the hands of a receiver and all other liabilities that had matured and upon information, and belief it denies that said St. Louis, Iron Mountain and Southern Railway Company is without means to pay either any of its fixed charges or any of its current liabilities. This defendant further avers that it has no knowledge as to whether or not the receiver of the properties of the St. Louis, Iron Mountain and Southern Railway Company, the owner of more than 90 per cent. of the income bonds, has requested the complainant herein to bring this suit, as alleged. This defendant further denies that any sums of interest as specified in Paragraph 27 of complainant's bill are in default or exist, and it expressly denies that any part of said sums as interest or otherwise is in default or that any sum, interest or otherwise, remains due, owing and un-

paid under the terms of said income bonds and said mortgage securing same.

XXIX.

Defendant denies each and every allegation of fact set forth in Paragraph 28 of the bill of complaint and denies that this defendant should account to complainant for the amount of any
135 net income applicable to the payment of interest on income bonds, for the reason that no such net income exists and no diversion has been made as alleged, and it expressly denies that it is entitled by the terms of the said mortgage to exercise any right of entry or to the appointment of a receiver or receivers of the mortgaged premises and of the earnings, revenues, rents, issues and profits thereof.

XXX.

Answering the allegations contained in Paragraph 29 of complainant's bill, defendant admits that it has outstanding approximately $3,400,000.00 principal amount, of promissory notes, which matured on the 1st day of June, 1915, and that the principal of said notes remains unpaid. The holders of said notes, however, accepted and received payment of the interest due upon said notes up to and including the 30th day of November, 1915. It expressly denies, however, that it is without means to pay said notes. This defendant would state, however, that said notes were given in payment of interest that had been declared by its Board of Directors as earned on said Income Bonds. This defendant avers, however, that it has large offsets both legal and equitable as to a considerable portion of the amount represented by said notes, and it avers that upon a complete settlement and accounting between some of the holders of said notes, this defendant will not owe the entire amount of same, but that said amount finally found to be due and payable will be substantially decreased.

Defendant further avers that it now has under consideration the question as to whether or not the indebtedness represented by said notes constitutes a legal and valid obligation as against this defendant, and it reserves the right upon further investigation and advice to test the validity of said notes as an obligation and indebtedness against it.

It further avers that the sum of approximately $820,000.00 of said notes is claimed to be owned by the St. Louis, Iron Mountain and Southern Railway Company, and approximately the same amount is claimed to be owned by the Missouri Pacific Railway.

It further says that the indebtedness represented by said notes, if any indebtedness there was, accrued many years ago, and
136 that the said parties and holders of said notes have from time to time extended the payment of same and have never until a short time before the filing of this suit, made any demand upon this defendant for the payment of same, but has always led this defendant to believe that said notes could and would be extended until such time and times as its finances would enable it to pay off said

notes without detriment to the proper handling and operation of its property, and defendant avers that any and all pressure and urgent demand upon it for the payment of said notes was and is really made to aid complainant herein and especially the St. Louis, Iron Mountain and Southern Railway Company and its representatives in the prosecution of this suit and for the special purpose of harassing this defendant and embarrassing it in the management of its property.

It further avers that the St. Louis, Iron Mountain and Southern Railway Company and the Missouri Pacific Railway Company are closely identified by virtue of stock holdings and is operated as an entire system and by the same officers and receiver, and that the Missouri Pacific Railway Company is a large holder of the shares of this defendant.

Defendant now says that there is pending a suit in the District Court of Texas, Dallas County, styled The Union Trust Company vs. The Texas & Pacific Railway Company, wherein suit is brought to recover judgment upon a part of said $3,400,000.00 notes in the amount, to-wit, of $828,380.00. In this suit said Union Trust Company claims to have derived same from the Missouri Pacific Railway Company, but in truth and fact, defendant avers, the legal title of said notes is in the Missouri Pacific Railway Company and said notes are held by the said Union Trust Company under some kind of a pledge.

It now avers that it, The Texas & Pacific Railway Company, has filed an aswer to said notes, pleading various defenses thereto, as will appear by a certified copy of said answer which will be exhibited on a trial of this cause.

Defendant says that it is advised that there exists merit in the defenses that it has set out to said notes and states that until there is a full trial upon the issues therein made it cannot be definitely
137 determined what amount, if any, is owing by this Defendant upon said notes.

Defendant further says that there is a suit pending in one of the State Courts of New York, by the estate of Jay Gould upon certain portions of said notes, aggregating approximately $1,700,000.00. Defendant says that there is an issue made as to the validity of said notes and as to whether or not this Defendant is liable thereupon, as will fully appear by the pleadings filed in said cause.

It further states that it has been advised by proper representatives of the estate of said Jay Gould, the holder of said notes, that suit was brought thereon, not for the specific purpose of enforcing a collection against this Defendant, but in order to protect the rights of said estate, caused and occasioned solely by the reason of the filing of this suit, and the filing of a suit on the part of the St. Louis, Iron Mountain & Southern Railway Company, or its Receiver, upon certain notes held by said company, which said suit was filed in the United States District Court at Shreveport; and also upon knowledge of a contemplated suit filed by the Union Trust Company in the state District Court at Dallas.

And it further avers that it is advised by representatives of the

said estate of Jay Gould that it is willing to extend the payment of the notes held by said estate, provided the owners and holders of the other notes agree to do likewise.

As to the $820,000.00 of notes claimed to be owned by the St. Louis, Iron Mountain & Southern Railway Company, Defendant says that suit has been filed upon same in the United States District Court at Shreveport, Louisiana, by B. F. Bush, Receiver of the St. Louis, Iron Mountain & Southern Railway Company. Defendant has not yet filed its answer to the merits in said suit, but it avers that it will raise the same defenses as to the validity of said notes as has been raised in the other two suits, and, in addition, it says that it has large offsets to said notes, and in the event it should be liable upon said notes, it charges upon a full and final hearing of said cause, that the amount recovered will be greatly reduced. In other words, Defendant is advised, and so charges, that it has offsets and claims against the St. Louis, Iron Mountain & Southern Railway
138 Company aggregating approximately $600,000.00 which should be allowed as a credit upon said notes in the event any recovery at all is had upon same.

XXXI.

Answering Paragraph 30 of complainant's bill this defendant admits that it is the owner in equal proportions with the St. Louis, Iron Mountain and Southern Railway Company of substantially the entire capital stock of the Trans-Mississippi Terminal Railroad Company, the successor of the Trans-Mississippi Terminal Company, a Louisville corporation formed to construct and own railways and railway terminals in the City of New Orleans, Louisiana.

It admits that the construction of said railway and railway terminals is now in progress, in fact said terminals are practically completed and ready for operation. It admits that said terminals have heretofore been financed by the issue of notes of the Terminal Company, but the amount of notes stated in this paragraph is not correct, the amount of notes outstanding being approximately $4,250,000.00 secured by the pledge of the first mortgage bonds of said Terminal Company in the sum of $6,071,000.00 face amount.

It admits that said notes and bonds have been jointly and severally guaranteed by this company and the St. Louis, Iron Mountain and Southern Railway Company. It admits that the entire issue of such notes have been negotiated, but it denies that the entire authorized issue of such bonds have been sold and pledged, as the entire issue of bonds is $7,500,000.00 and only $6,071,000.00 have been pledged. It admits that the proceeds of the notes sold have been practically expended but expended in the construction of the terminal properties in the City of New Orleans and that said properties are now not only ready for operation but are in part being operated.

It admits that this company has agreed with the St. Louis, Iron Mountain and Southern Railway Company to furnish one-half of all additional moneys which may be required to complete said railway and railway properties and states that said agreement consists in an

agreement entered into between the St. Louis, Iron Mountain
139 and Southern Railway Company, and the Texas and Pacific Railway Company, with the Trans-Mississippi Terminal Railroad Company, by which this defendant and said St. Louis, Iron Mountain and Southern Railway Company become tenants of said Terminal Company in the use of the terminal properties in the City of New Orleans under the terms of the agreement entered into between said parties dated the 15th day of June, 1914, and certain supplements thereto, which contracts will be referred to for a full understanding of their terms and conditions.

It denies that said Trans-Mississippi Terminal Railroad Company would be wholly without the means and wholly unable to procure the means necessary to complete the construction of its railway and railway terminals. On the contrary, this defendant says that said terminals have reached a point of completion in which they are now being operated. This company intends and expects to carry out and perform the terms of the agreement by which it is to use the said terminals and it is advised and believed and so alleges on information and belief, that the St. Louis, Iron Mountain and Southern Railway Company will likewise carry out and perform the terms of said agreement, in which event said Terminal Company will have ample means to carry out all the purposes of its organization and to conduct and operate said terminals efficiently and to the interest of both this defendant and the St. Louis, Iron Mountain and Southern Railway Company.

This defendant denies that the St. Louis, Iron Mountain and Southern Railway Company is wholly and completely insolvent. It denies that the St. Louis, Iron Mountain and Southern Railway Company will be unable to provide or procure to be provided the funds requisite to be furnished by it for the completion of said railway and railway terminals in New Orleans. On the contrary, it states that it is to the best interest of the St. Louis, Iron Mountain and Southern Railway Company to carry out all the terms and conditions of said operating agreement and the Court appointing the receiver of the St. Louis, Iron Mountain and Southern Railway Company, to-wit: B. F. Bush, if correctly advised of all the facts in the exercise of a sound discretion and judgment and for the proper protection of the rights of the said St. Louis, Iron Mountain
140 and Southern Railway Company will require the receiver of said company to carry out and perform, ratify and approve all of the conditions of said operating agreement.

This defendant admits that said railway terminals at New Orleans are very essential to the interest of both the St. Louis, Iron Mountain and Southern Railway Company and The Texas and Pacific Railway Company. That this defendant would have no terminal or terminal facilities should it not have the use of the terminals provided by the Trans-Mississippi Terminal Company. It admits that the port of New Orleans is very essential to the operation of the lines of this defendant and of the Iron Mountain Company.

It further states that this company is willing, ready and able to carry out all of the terms and conditions of the agreements made

with the Terminal Company for the use of said terminals at New Orleans. That said Terminal Company is a solvent concern with sufficient property to secure the payment of all of its obligations.

That this defendant is able, willing and ready to carry out all of its guarantees upon the notes and bonds of said Terminal Company, and it denies that it is unable to provide or procure to be provided funds necessary for the purpose of carrying out its guarantee on said bonds or notes or for carrying out its obligations under its operating contract with said Terminal Company, and it denies that said Terminal Company is without the necessary funds for the completion of its said railway and railway terminals, and it denies that this defendant is and will be wholly unable to provide funds for the completion of said terminals as alleged, and this defendant avers that it is the duty of the said B. F. Bush as receiver of said St. Louis, Iron Mountain and Southern Railway Company (which company is shown to be the owner of approximately 94 per cent. of the second mortgage bonds sued on in this cause and is the real complainant in this cause) to promptly advise the Court appointing him as such receiver, of the true facts concerning said Terminal Company and its relation with said Iron Mountain Company and to make prompt application to the Court for full authority to ratify, approve and carry out any and all of the obligations made and entered into be-
141 tween said Terminal Company and the said St. Louis, Iron Mountain and Southern Railway Company.

This defendant states that prior to the institution of this suit it had ample credit to raise such funds as it might need to advance the said Terminal Company to carry out the scheme of the Terminal Company in the matter of constructing and operating its terminals in the City of New Orleans. That the effects of this suit was to libel the credit of this company and *while* to some extent has impaired its credit to raise such funds and this defendant alleges that it is to the interest of both this company and the St. Louis, Iron Mountain and Southern Railway Company to make full use of said terminals and to carry out all of the contracts and agreements under which they obtained the right to use same. And defendant avers it is and will be financially able to do so.

That the port of New Orleans is necessary and essential to the business of both this company and the St. Louis, Iron Mountain and Southern Railway Company and without the use of said terminals said companies would practically be without the necessary terminals with which to conduct and prosecute their business into and through the port of New Orleans.

XXXII.

This defendant, answering the allegations contained in Paragraph 31 of complainant's bill, says: It expressly denies that it has outstanding any floating indebtedness in a substantial amount for material and supplies furnished to date for operating expenses, much of which complainant alleges is now overdue. It expressly denies that this company is unable to pay same. On the contrary, this defendant states that its current outstanding bills are by far the smallest amount

outstanding in its history, while its current earnings are in excess of any other period.

That all current bills are and will be paid promptly at maturity and this defendant is supplied with necessary means to meet said bills as they mature and are presented for payment and this without the necessity of effecting loans for the purpose of meeting such obligations.

142 This defendant denies that it is without means adequate and available to meet its immediate pressing needs in operating its system. It expressly denies that there was any grave danger that some of the creditors holding said floating indebtedness for supplies might bring suits in respect thereof and might levy execution on the lines of railway owned by this company and on equipment, material, supplies and other property of this company. On the contrary, this defendant says it has ample means to meet all of its current bills, was meeting and is now meeting same. That but for the institution of this suit, which this defendant alleges is a libel upon its credit, its credit was unquestioned and it had no difficulty and has no difficulty now in obtaining all supplies necessary for its operation and maintenance.

This defendant expressly denies that any suits will be brought against it by its outstanding general creditors for material and supplies and says no judgment will be obtained against it and no executions levied upon its property. That there is no necessity for this Court or any Court to take possession and impound the property of this defendant for the purpose of preserving it against the attack of the general creditors. That any such attack will be made and that there is the possibility of any such attack, only exists in the imagination of the real complainants in this bill, to-wit: the St. Louis, Iron Mountain and Southern Railway Company and its receiver.

XXXIII.

Answering Paragraph 32 of complainant's bill, this defendant says it denies that its incomes and revenues are or will be insufficient to pay off and discharge the indebtedness now due and owing by it. It denies that it has no resources with which to provide for the payment of such indebtedness, and it expressly denies the allegation in this paragraph of complainant's bill that it is insolvent. On the contrary, it states that it is a going business concern with a well established commercial credit and in a physical condition at this time to perform its duties to the public and obtain all the necessary means to that end.

143 ## XXXIV.

Answering Paragraph 33 of complainant's bill, this defendant admits that the railroads, properties, premises and franchises covered by the second mortgage, Exhibit A, to the bill herein constitutes one single property and is an instrument and highway of commerce in several states and that same should be conducted as a single enterprise.

It further admits that if same should be sold, that it should be sold as a whole. It denies, however, that the complainant in this

cause of action has any right to have same sold at all or that this complainant or any of the income bondholders has any right of foreclosure under the said second mortgage at this time and under the allegations contained in its bill.

XXXV.

Answering Paragraph 34 of complainant's bill, this defendant says it expressly denies each and every allegation therein contained except that it admits that no proceeding has been commenced in law or equity for the collection or enforcing of said mortgage debt other than this suit, and this defendant alleges that this suit is without merit and should not have been instituted.

XXXVI.

This defendant expressly denies each and every allegation of Paragraph 35 of complainant's bill and it expressly denies that the complainant is entitled to the relief therein prayed for or any part thereof.

XXXVII.

This defendant, answering Paragraph 36 of complainant's bill, says: It denies that this is a civil suit in equity or a controversy that arises under the Constitution and Laws of the United States, and it avers that complainant has no legal or equitable lien upon any of defendant's property which it is entitled to enforce in this or any other Court.

144 XXXVIII.

Defendant denies that complainant is entitled to the relief or any part thereof as prayed for in its bill.

XXXIX.

And now comes defendant, The Texas and Pacific Railway Company and for further answer in its behalf says: That under and by virtue of the terms and provisions of the said second mortgage referred to and made Exhibit — in Paragraph 20 of complainant's bill, among other provisions and obligations, it was provided that this defendant, The Texas and Pacific Railway Company, should pay off and discharge and cause to be paid off and discharged all taxes, assessments and all other liability and governmental charges which from time to time might be lawfully levied or imposed by competent authority upon the said railway property and premises or any part thereof, the lien whereof might or could be held to be superior to the lien of the second mortgage bonds and also all interest charges which from time to time might become due and payable upon any bonds having a prior lien to the bonds secured by the said second mortgage, so that the security of said second mortgage bonds should at all times be fully maintained and preserved, and it was further provided and by virtue of Section II of Article III of said second mortgage, it

obligated itself at all times to maintain in full quantity the number and efficiency of its rolling stock, tools, machinery, buildings, bridges and other structures and by virtue of Section III of said Article II this defendant obligated itself to preserve all of the rights and franchises to it granted and upon it conferred by the Acts of Congress appertaining to its railway property and premises subject to the lien of said second mortgage and that it should at all times maintain, preserve and keep said property and every part thereof with its rolling stock, fixtures, appurtenances and every part and parcel thereof in thorough repair and working order at least equal to its then present condition in respect to the roadbed, ties, rails, motive power, rolling stock and equipment, and likewise the said The Texas and Pacific Railway Company was obligated to keep said property fully

145 supplied with suitable and sufficient motive power, rolling stock and equipment and was obligated from time to time to make all needful and proper repairs, renewals, replacements, useful operations, conditions, betterments and improvements so as to maintain the same in proper order and keep in complete repair and good working condition so that the traffic and business of said road and every part thereof should at all times be done with safety and expedition.

It says that by virtue of Article 5 of said second mortgage it became obligated to pay the principal of same at the maturity thereof and to "pay interest on said principal sum (meaning principal sum of said mortgage bonds) up to the rate of 5 per cent. per annum from December 1, 1887, payable annually on the 1st day of March in each year, the first payment, if any, to be due March 1, 1889, in like gold coin out of the net income of the railway company as the same may be determined by the Board of Directors of the railway company."

It was further provided by said Article 5 that if the income of the railway company applicable for the interest on said bonds should not in the judgment of the Board of Directors be sufficient to pay the said interest in full, such interest or so much as should remain unpaid should not accumulate.

Defendant now avers that all of the second mortgage bonds now outstanding were issued subject to the terms and provisions herein recited and subject to the terms and provisions of all the said second mortgage.

Defendant alleges that it was its duty to comply with the terms and provisions of said mortgage, and that neither the complainant nor the holder of any of the said second mortgage bonds were entitled to receive any interest upon said bonds during any interest-bearing period until all of the terms, stipulations and conditions of the said second mortgage bonds had been fully complied with. It avers that it has from time to time and at all times made only such expenditures and investments of the funds coming into its hands upon the railway lines and property covered by said second mortgage as it had the power and right to make by virtue of the terms of same.

That it has at all times faithfully, as far as its income and

146 funds would permit, kept and performed all of its obligations with respect to the provisions of said second mortgage. It

now expressly avers that neither the complainant nor the holder of any of said mortgage bonds was entitled to receive or demand any interest accumulating during any interest-bearing period except such net income as might arise after having discharged all of its obligations with reference to preserving and maintaining said property, and it further avers that even though at the end of any interest-bearing period or of any calendar or fiscal year there should remain any surplus for said particular period that said sum was not and could not be available for the payment of interest except as same might be determined by the Board of Directors of this defendant, and further that the said Board of Directors not only had the power but it was its duty to see that a sufficient and proper amount of surplus should be preserved and kept in the treasury of the company at all times to protect the property covered by said mortgage bonds and to carry out and fulfill the obligations of this defendant.

Defendant further avers that no fund or net income at any time ever became available or applicable to the payment of interest on the said second mortgage bonds except such as might remain after the performance and discharge of all of the obligations contracted for in said second mortgage and such as should be available after the said Board of Directors had determined what amount of surplus, if any, remaining, should be reserved to take care in the future of any deficits which might occur in the management and operation of the property, and take care of all contingent liabilities which might thereafter arise and which would affect the property, and also take care of any shortages or other deficiencies which might fail to be collected in items treated as income.

As part illustration Defendant would say that at all times there existed and was pending against this Defendant large amounts of judgments which had been obtained in various courts and were then pending in appellate courts, a large amount of which this Defendant was liable to be called on to make payment from time to time, and it was therefore necessary to anticipate such unusual payments and provide proper funds for same. These liabilities grew out of
147 the operation of the road and were, therefore, chargeable as against any net income.

And as a further illustration Defendant says that in the operation of an extensive property such as The Texas & Pacific Railway unusual and unforeseen accidents were liable to occur in which Defendant might be held liable, and it might require a considerable sum of money on any occasion to make proper settlements with reference thereto.

Defendant further avers that by virtue of the covenants and obligations made and entered into in said second mortgage, the said Board of Directors had a broad discretion with reference to the right and power to determine what sum or sums, if any, was available for the payment of the interest to any extent upon said second mortgage bonds during any interest-bearing period, and it expressly avers that the said Board of Directors have well and faithfully kept and performed *its* duties, and the confidence and power reposed in and granted to them, and it here and now avers and pleads that all in-

come properly available for and applicable to the payment of interest on said second mortgage bonds has by due action on the part of said Board of Directors been ordered to be paid and has been paid to each and every holder of said second mortgage bonds, and that no sum or sums of money on account of interest arising upon said second mortgage bonds is now due and payable or has ever been due and payable save and except such as was declared to be so due and payable by virtue of the action of its Board of Directors.

Defendant further and expressly avers that even though any surplus may have been left over at the end of each interest-bearing period or at the end of any calendar or fiscal year that same did not necessarily become applicable to and available for the payment of interest on said second mortgage bonds, but same rested within the discretion of the Board of Directors and it avers that the action of said Board with respect thereto was and is final and conclusive.

Defendant avers that as a matter of law and which was well known to the purchasers and holders of said mortgage bonds and which entered into and became a part of the obligations of said second mortgage and the income bonds issued thereunder, it was
148 the duty of this defendant to keep it properly in good condition and to make all proper and needful expenses thereunder, so as to enable it to perform its public duties with safety and expedition and to properly maintain and carry on its business as a common carrier. To do this it was absolutely necessary to see that all the proper expenditures should be made, not only in strict accordance with the obligations entered into by virtue of the terms and provisions of said second mortgage, but to do and perform each and every other act and to make all needful and proper expenditures which would protect the property and enable it to perform and discharge its public duties.

It further avers that this defendant has at all times, as far as its means were available, kept and performed all of its contractual obligations as well as those imposed upon it by law; that had it failed in the performance of any of said duties, the security of the said income bonds would have become greatly impaired, if not absolutely destroyed, and it says that each and every item of expenditure made has been for the benefit of said second mortgage bonds and preserved the lien held by same.

Defendant expressly denies the allegation contained in Paragraph 25 of complainant's bill that except as to the amounts payable for interest on the bonds other than the income bonds mentioned in this suit and for taxes upon property subject to the lien of the second mortgage bonds, all other expenditures constituted a wrongful diversion and misapplication of the net income of this defendant applicable to the payment of the interest on said income bonds and was in violation of the rights of the holders of said income bonds.

Defendant expressly avers that it had the right to make expenditures on account of interest charges on debts either funded or unfunded on account of interest and discount on current indebtedness, taxes, additions and betterments, property and equipment, property and new equipment and in the liquidation of debts and obligations

incurred prior to the execution of the said second mortgage, and it further expressly provides that each and every payment and expenditure which it has made on account of any item or for any purpose since the execution of said second mortgage bonds or since
149 the date that interest thereon became payable, has been a lawful expenditure and that it has never made or caused to be made any wrongful diversion or misapplication of any net income applicable to the payment of the interest on said income bonds.

XL.

And for further answer defendant says that if it at any time paid out any sums of money as interest on the funded or unfunded debts or interest and discount on current indebtedness, that said debt and debts arose on account of the operation of the road and that it had a right to take care of same out of the revenues derived from the operation of the road or otherwise.

It is not claimed that this defendant had any other sources of revenue with which to take care of the matters complained of except from its current earning, and it is clear that it was right and proper to make payments of all of the items complained of before any net income could exist which would be applicable to the payment of the interest on said income bonds. The same is true with reference to taxes, additions and betterments as well as equipment and new property and new equipment.

XLI.

Further answering, this defendant says that if it should be held by the Court, which is denied by this defendant, that it, the defendant, was not entitled to make payment out of the current earnings on account of any indebtedness arising prior to the execution of said income bonds, or when interest began to accrue upon same according to the terms of said bonds; it says that not all of the income shown by the reports of the Board of Directors as set out in complainant's bill and in the defendant's answer, arose on account of the income received since said bonds may have commenced to bear interest, but in truth and fact, prior to December 1, 1887, the said railway company or its representatives and persons from whom it received said property had earned large sums of money then due and outstanding and that it collected large and various sums of money after December 1,
150 1887, and after December 1, 1888, and succeeding years thereafter, which was not earned during said periods but had been earned prior thereto, and if an accounting is had and this defendant is chargeable with the payments made on account of any indebtedness existing prior to the time said bonds began to bear interest, then it says it should be credited with all sums which were earned prior to December 1, 1887, and prior to December 1, 1888, and that same should be excepted and taken from all accounts chargeable against this defendant on account of current earnings and net income as applicable to interest payments on said second mortgage bonds.

XLII.

For further answer and pleading herein defendant says that except as to the amount of income of the road as was declared available and applicable to the payment of interest on said income bonds and which was actually paid, the said Board of Directors of this defendant regularly and at stated periods duly considered the question as to whether or not any net income was available for and applicable to the payment of interest on said income bonds and did in the exercise of the power and authority conferred upon it, regularly and annually from time to time, declare that no net income was earned or was available for and applicable to the payment of interest on said second mortgage bonds.

It avers that this complainant and its predecessor, as well as each and every holder of said income bond or bonds, knew of the action and determination of said Board of Directors, and knew of the fact that no order or declaration had been made by said Board of Directors directing the payment of any sum or sums toward interest on said second mortgage bonds, or by proper diligence could have known of same, and each and all of them acquiesced therein and failed at any and all times to make any complaint with reference to the action of said Board of Directors or with reference to the failure of the said Board of Directors to determine that any net income was available or applicable to the payment of the interest on said income bonds, and have in truth and fact acquiesced in the action of the Board of Directors and in the construction given to the terms
151 and provisions of said second mortgage by said Board of Directors for the period from time to time and at all times since the first day of March, 1889, and up to the filing of this bill.

Defendant says that the complainant and its predecessor as well as the holder and holders of said second mortgage bonds have acquiesced in the action of the Board of Directors both by expressed acts and by inferences and failure to make any complaint or complaints with reference thereto, or in failing to repudiate in any way the action of said Board of Directors, and in failing to make any demand upon said Board for the payment of any interest out of any remaining surplus or otherwise.

Defendants says that if at any time or times there existed any net income available and applicable to the payment of interest on said income bonds save and except such as was paid, that the holder and holders of said mortgage bonds and their representatives have made no claim thereto, but have permitted this defendant from time to time to use all of such sum and sums, if any there be, in making additions, betterments and various other expenditures, towards the improvement and upkeep of said road, the effect of which maintained and increased the security of said income bonds, and it says that the holders of said second mortgage bonds and each and all of them have been guilty of laches in not asserting any rights which they may have as set forth in said bill and that a Court of equity cannot and will not entertain the plea in their behalf presented; as will be seen if the complainant for and on behalf of the said income

bonds should now be permitted to have an account stated and charge this defendant with the surplus or any part thereof which is claimed to have existed from year to year as applicable to the payment of interest, it would amount to large sums of money and would be greatly to the prejudice of this defendant and its property and would create a burden on its stockholders, the first mortgage bonds and would seriously affect the rights of all other persons interested, as well as the public generally. And on account of such delay and laches on the part of said bondholders and their representatives the relief sought should be denied.

In addition thereto it says that as appears from complain-
152 ant's bill all of said alleged surplus has been expended by this defendant either in properly maintaining the operation of said road or in additions and betterments, repairs and renewals, which enhance the security of the said income bonds, and it therefore says and pleads that no Court of Law or Equity will in good conscience permit complainant or any income bondholder at this late date and under the facts as herein alleged, to have an accounting or a decree fixing any debts or liability against this defendant by reason of the expenditures as actually made or on account of any failure on the part of this defendant, to apply any surplus to the payment of the interest on said income bonds except such as has been actually paid.

It therefore pleads and relies upon the laches of complainant and the holders of said second mortgage bonds and the acquiescence of said parties in the acts of the Board of Directors as a bar to any of the relief or any part thereof prayed for by this complainant.

XLIII.

And for further answer and plea in its behalf this defendant says that by reason of the acquiescence of complainant and its predecessor and the holder and holders of the said income bonds, in the action of the Board of Directors with reference to its determination and the exercise of its discretion concerning the payment or non-payment of interest upon said income bonds and by reason of the failure of said parties and each of them to make any complaint or demand upon said Board of Directors to have determined certain net income as applicable to the payment of interest on said income bonds as complained of and by reason of said parties and each of them in permitting and allowing the said Board of Directors and officers of this defendant without complaint or dissent to use all surplus arising from time to time in expenditures on account of the operation of said road and in additions and betterments and other matters hereinbefore set forth, defendant says that complainant and each and all other parties represented by it is estopped both in law and equity in now seeking to overturn the action of the Board
of Directors and in obtaining a decree from this Court for
153 the relief or any part thereof prayed for, and it pleads and relies upon same as a complete defense to this suit.

XLIV.

And for further plea and answer in its behalf, defendant says that if at any time or times complainant or the holder or holders of any of said income bonds ever had any right or cause or causes of action on account of the interest due on said income bonds that said cause and causes of action accrued more than two years prior to the institution of this suit and it, therefore, pleads and relies upon the Statute of Limitations of two years as a complete bar to any right of recovery in this cause.

XVL.

And for further plea and answer in its behalf, defendant says that if at any time or times complainant or the holder or holders of any of said income bonds ever had any right or cause or causes of action on account of the interest due on said income bonds that said cause and causes of action accrued more than four years prior to the institution of this suit and it, therefore, pleads and relies upon the Statute of Limitations of four years as a complete bar to any right of recovery herein.

XLVI.

And for further answer and plea in its behalf, defendant says that all cause and causes of action set forth in complainant's bill, if any there be, arose more than two years prior to the filing of this suit and defendant, therefore, pleads and relies upon the Statute of Limitations as a bar to any right of recovery herein.

XLVII.

And for further answer and plea in its behalf, defendant says that all cause and causes of action set forth in complainant's bill, if any there be, arose more than four years prior to the filing
154 of this suit and defendant, therefore, pleads and relies upon the Statute of Limitations as a bar to any right of recovery herein.

XLVIII.

For further answer and plea herein defendant says that by virtue of Article 5 of the said second mortgage, it was expressly provided among other things: "there shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured thereby except in the event of a foreclosure of the first mortgage bonds."

Defendant avers there has been no foreclosure of the first mortgage and said first mortgage is nowise in default on account of failure to make any payment of interest or any payment of principal or otherwise, and said provision is a substantial element of credit of this company as to its general creditors and all other person or persons dealing with it, and was expressly intended to prohibit and prevent the very action that complainant is now seeking to do, and it pleads and relies upon the contract agreement and provisions

herein referred to as a bar to the relief prayed for by said complainant, and if defendant is mistaken as to this, then it says and pleads that complainant's cause of action, if any it has, is purely one of law and authority and different from that involved in this suit.

XLIX.

For further answer and plea in its behalf, this defendant says that under and by virtue of the second mortgage it was expressly provided that the said second mortgage should not mature until the year 2000 which it is alleged was the date of maturity of the first mortgage.

It says that said provision was a substantial and material one and is binding upon the complainant and that this Court is without power to grant any decree against this defendant for the amount of the said second mortgage or make any order of sale in connection with such decree, and that the said complainant and all holder and holders of said mortgage bonds are not entitled
155 on any account or for any reason to have a foreclosure sale of the property of this defendant upon the indebtedness or any part thereof represented by the said income bonds.

L.

For further answer defendant says that as an evidence of the good faith and sound judgment and the proper action of its Board of Directors in not applying any of the income other than it did to the payment of interest on income bonds, defendant would show the Court that for the period of years beginning with the six month-ending December 31st, 1888, and ending November 30th, 1915, the income and profit and loss balance sheet of this defendant shows that there was a deficit in the operation of its property of $134,962.40. That where an apparent surplus is shown for any particular year, actual deficits are shown for the next or following year or years and where an actual surplus is shown in any particular year, in every instance same was more than anticipated in the way of needed improvements, repairs and additions, which could justly and rightfully be made under the terms of said second mortgage, and whatever apparent surplus did appear, when, in the judgment of the Board of Directors same was not applicable to the payment of interest, said surplus was properly paid out for the purpose of improvements, betterments, renewals, repairs, taxes and operating expenses generally, all going either to the preservation of the property or to its improvement and to the end that it might be operated more efficiently and economically, all of which inures to the benefit of the income bondholders.

Defendant alleges it was the peremptory duty of the directors of this company to keep its property in safe operating condition and to furnish the best service commensurate with its revenues to the public, that is, both by virtue of the obligations of the second mortgage and by virtue of the laws of the different states in which the line of railway was located and operated; that in the exercise

of their best judgment, acting in the utmost good faith, the said Board of Directors of this company have undertaken to carry out this public duty.

156 Defendant alleges that in the payment of interest that was actually paid upon said income bonds, said Board of Directors acted more favorably and liberally towards said income bond holders than they deserved under the actual existing conditions, and as a matter of fact there has been no time in the history of this property since the execution of said income bonds when the property did not actually need every cent of its surplus revenue that it might have from earnings to improve its equipment, its roadbed, its power and its conditions generally.

Defendant states that the said B. F. Bush, receiver of the St. Louis, Iron Mountain and Southern Railway Company, in April, 1911, became the president of the Missouri Pacific Railway Company and of the said St. Louis, Iron Mountain and Southern Railway Company. That he had full knowledge of the existing conditions surrounding the operation of this defendant and had full knowledge of the fact that the Board of Directors had determined and declared no revenue was applicable to the payment of interest upon said income bonds, and at no time from said date down to the filing of this suit did the said Bush, for himself or on account of the properties represented by him, make any demand for an accounting under the said second mortgage or for any possession under same or for the institution of any suit thereon or questioned in any way the good faith or action of the Board of Directors concerning interest upon said income bonds.

Defendant avers, upon information and belief, that the Missouri Pacific Railway substantially owns the stock of the Iron Mountain Railway or dominates and controls same and that said companies are operated as one system subject to the same management and control, and defendant here expressly avers that any request made by said Bush as receiver of the St. Louis, Iron Mountain and Southern Railway Company or in any other capacity with reference to the bringing of this suit and the attack made upon the good faith of the Board of Directors of this defendant and the bringing of this suit was had and made for the purpose of securing the control of this defendant's property for the benefit and use of the Missouri Pacific Railway Company and of the St. Louis, Iron Mountain and Southern Railway Company.

157 Defendant charges that such control of this company either by the Missouri Pacific Railway Company or the Iron Mountain Company or by both jointly would be in contravention of public policy and unlawful and in violation of existing laws.

L-A. In explanation of the printed reports of the Board of Directors of this Defendant, referred to in Complainant's bill and in this answer, and of the surplus shown to exist from year to year, as therein shown, and as well as to the surplus shown by reports hereinafter to be filed, and which is sometimes referred to in Complainant's bill and this answer as "income" or "net income," Defendant says: that in arriving at said surplus "income" or "net income" are

sums and items earned or accruing during the particular period referred to and are treated as income when, in fact and truth, large amounts of same at the end of the particular stated period had not been actually collected and received, but was represented by amounts earned during the particular period, and due from other connecting lines, and in various other ways. Said surplus or "income" or "net income" did not, therefore, represent actual cash on hand at the end of the particular period, but rather represented the amount actually received as well as the amount and amounts earned by and due the company for the particular period, and which had not then been collected, and many items of which it was anticipated would not be collected for a considerable length of time thereafter, and various items have never been collected and received.

Defendant further states, as will appear upon the hearing of this cause, that various items were charged in as income which did not arise or grow out of the operation of the road, and it says that if an accounting is to be had and stated between the parties hereto that said sums treated as "income" and which did not grow out of the operation of the road should not be chargeable against this Defendant.

All of the allegations of this Defendant with reference to "surplus," "income" and "net income" is to be taken and considered in connection with these allegations.

L.-B. Defendant says, as hereinbefore alleged, and which
158 is now reiterated, the holders of said income bonds during certain years received and collected a large amount of interest which was not available or applicable out of any "income," "net income" or "surplus" for that certain interest-bearing period, and same should not have been so paid to them, and it avers that if there is or should be any accounting had or taken in this cause that all sums and amounts so paid and received by said bondholders in excess of the amount available and applicable under the terms of the mortgage for the particular interest-bearing period, should be charged to said bondholders.

L.-C. Defendant denies the allegation of fact contained in the amended bill of complaint, as contained in said part of the amendment made in paragraph 27 thereof.

L.-D. Defendant says that the provisions of the income bonds and the Second Mortgage speak for themselves.

Defendant expressly denies that it failed to perform any duty charged upon and expressly entrusted to it and that it diverted portions of its net income for purposes other than the payment of interest on the income bonds, save and except such as it, through its Board of Directors, had the right to do. It says that its said Board of Directors acted fully within its power and discharged its duties faithfully with respect thereto.

And it further says that if the said Board of Directors in any way failed to perform its duty and did divert portions of net income for purposes other than the payment of interest on the income bonds, that the Trustee and bondholders acquiesced in same and received the full benefits therefrom.

In explanation of the printed reports of the Board of Directors of this Defendant, referred to in Complainant's bill, and in this answer, and of the surplus shown to exist from year to year, as therein shown, and as well as the surplus shown by reports hereinafter to be filed, this Defendant says: the said printed reports of the Board of Directors referred to in Complainant's bill and in this answer do not show all of the expenditures made from time to time by this Defendant. In truth and fact Defendant avers that in various and sundry years large sums of money were expended by this Defendant for improvements, betterments, equipments, and various and
159 sundry other items and accounts, and for which expenditures this Defendant was entitled to deduct and has deducted from its gross income before any Second Mortgage bondholder should be paid anything on account of interest on said bonds. A full and complete statement of said items will be furnished at the hearing of this cause.

As stated, said items were not taken into account in the printed reports in connection with the statement of gross income, net income, expenditures, etc. Defendant, therefore, says that upon a complete statement, the amount of net surplus on hand for any particular year will be much less than the surplus stated in the printed reports, and, for some years the deficit will be greater than that shown in the printed reports.

It further avers that the failure to deduct from the gross income the expenditures made as herein stated in no way operated to the detriment of the holders of the income bonds, but, to the contrary, they reaped a benefit thereby; and Defendant says that if any account is had and stated between the parties it is entitled to be credited with all expenditures made by it during each particular interest-bearing period rather than the expenditures shown by the printed reports.

Defendant says that the allegations made in this paragraph are to be taken and read with its allegations and admissions in this answer concerning income, net income and surplus, and it is not to be understood as admitting that the surplus, income or net income as shown by the printed reports is correct, but in truth and fact other additional amounts as herein alleged should be deducted.

LI.

In addition to the facts as hereinbefore set forth and in conclusion this defendant says:

It is not indebted to said Income Bondholders under said Second Mortgage in any sum as interest.

That the principal of said indebtedness as represented by said Second Mortgage Bonds does not mature until the year 2000.

160 That this defendant has not been in default according to the terms of said Second Mortgage in such a manner as would mature the principal of said Second Mortgage Bonds.

That this defendant has not defaulted in the payment of interest on its First Mortgage, and that said First Mortgage has not been

foreclosed, and the complainant herein is not entitled to a foreclosure of said First Mortgage securing said Income Bonds.

That the possession of the property by this defendant is just and lawful and should not be disturbed.

That the affairs of this defendant are being administered honestly, fairly and economically.

That both public policy and the law requires that said property should be administered by the officers and Board of Directors of this defendant, other than a committee appointed by the Trustee under the Second Mortgage or by the bondholders secured by said Second Mortgage.

That complainant has shown no equity, and has sho[illegible] no condition that would justify this Court in taking any action, especially in the matter of appointing a receiver.

That none of complainant's rights are jeopardized under existing conditions, nor will they be in anywise jeopardized by the possession and operation of said property by the Board of Directors and officers of said company.

That the assistance and ajd of this Court in being asked to appoint a receiver and take possession of this property is not made in good faith, and is not required or demanded under existing conditions.

And this defendant denies that it is insolvent.

For these and other good reasons, this defendant, having fully answered, prays to be dismissed with its cost in this behalf expended.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
Solicitors for Defendant The Texas and Pacific Railway Company.

CHADBOURNE & SHORES,
Of Counsel.

161 *Order of Dismissal,*

Filed February 23, 1916.

Order of Dismissal.

WEDNESDAY, February 23, 1916.

Heretofore, on February 16, 1916, came on to be heard the motion of the defendant New Orelans Pacific Railway Company to dismiss as to it the above styled suit. And said motion and the argument of counsel thereon having been heard, the same was denied.

Thereafter, on the same day, came on to be heard the Motion of the defendant The Texas & Pacific Railway Company to dismiss the bill of complaint in said suit for want of jurisdiction in the court to hear and determine the cause. And upon said day and the succeeding days said motion and the argument of counsel thereon were heard.

And it now appearing to the court that this court is without

jurisdiction to hear and determine the cause, it is considered by the court, and it is so ordered and decreed, that said motion of the defendant, The Texas & Pacific Railway Company is granted, and that the amended bill of complaint in said suit filed February 8, 1916, in substitution for the original bill of complaint therein, is dismissed as to both defendants solely upon the ground that this court is without jurisdiction to entertain the same. And it is ordered that all costs be taxed against the plaintiff.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

162 *Memorandum Opinion of District Judge.*

Filed February 28, 1916.

Memorandum Opinion of the Court on Defendant's Motion to Dismiss.

The arguments of counsel for and against the motion of the defendant The Texas & Pacific Railway Company to dismiss this cause on the ground that the court is without jurisdiction to hear and determine the issues raised by the bill of complaint, have taken a wide range. This, because of the importance of the questions involved and the inclination of counsel to argue these questions in all their bearings; also because of the desire on the part of the court to have these questions argued and threshed out as thoroughly as possible. This has been my desire and I have wished to throw the burden upon counsel, because of my temporary physical disability, which has prevented a reading and examination of the authorities urged upon my attention by counsel for and against the motion to dismiss. While I have consulted some of the authorities submitted, I have not been able to do this to any great extent. I have therefore invited counsel to read from the decisions at length.

As the arguments have progressed I have, with the increasing light, been able to reach my conclusion. I have not been able to formulate in writing the reasons leading me to the conclusions reached, so they may not be given with the perspicuity and care that I would like, and to which counsel by their able and exhaustive arguments have shown themselves entitled. However, I feel I have reached my conclusion advisedly.

As I view it, the Supreme Court in Osborne v. The Bank, 9 Wheat, 737, did not, in sustaining the jurisdiction of the cause because of the presence there of a federal question, distinguish between
163 the mere creation of a corporation by an act of Congress and the functions, powers and privileges created and reposed in such corporation. Chief Justice Marshall in that case seems to make this very clear. He says: "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses.

The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no rights, make no contracts, bring no suit, which is not authorized by a law of the United States. It is not only itself a mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being thus constituted have a case which does not arise literally, as well as substantially, under the law?"

When the congress by its enactment incorporated the United States Bank, its being as created was invested with and there inhered in it all the powers, functions and privileges given it by law. The Century Dictionary defines "Incorporate" as follows: "To confer corporate rights, as to incorporate a railway." Thus the creating of and the reposing in this entity these powers and functions, in my opinion, constituted in a proper and complete sense the act of incorporation. So it is with the Texas and Pacific Railway Company. When the congress by its enactment incorporated the Texas and Pacific Railway Company the result of the act of incorporation was to bring into being this entity clothed and endowed with certain functions, powers and privileges, as formulated and set forth in its charter.

I do not believve jurisdiction of a case has been held to exist in a court of the United States solely and alone by reason of the fact that one of the parties was a corporation created by enactment of congress without at the same time having in contemplation
164 the functions, powers and privileges granted by its charter and therefore inhering in and being a very part of the body incorporated. When thus considered of necessity there is given rise, at least potentially, to a federal question or federal questions, when it sues or is sued in a court of the country. Some of the decisions read by Mr. Locke simply refer to the fact that a corporation has a federal charter as the basis or ground for entertaining jurisdiction over the controversy before a federal court. I am of opinion that the courts in making such reference had in mind and intended to include as an implied though not stated ground the act of incorporation by congress lying behind such charter and also harked back to the reasoning of the Supreme Court in Osborne v. Bank and the Pacific Removal cases. From this latter case I quote as follows:

"If the case of Osborne v. The Bank of the United States, is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those acts of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and, by virtue thereof sus-

tain important relations to the Government of the United States." 115 U. S. at page 14.

From the date of its incorporation by an Act of Congress approved March 3, 1871, and its organization thereunder, to January 28th, 1915, the Texas and Pacific Railway Company by virtue of its federal charter and the provisions thereof has quite uniformly been able to sue and be sued, formerly in the United States Circuit Court and latterly in the United States District Court.

Section 5, of an Act amending an Act entitled "An Act to Codify, Revise and Amend the Laws relating to the Judiciary, Approved," approved January 28, 1915, reads as follows:

"No court of the United States shall have jurisdiction of
165 any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

It has been asserted in argument and it has been uncontroverted that at the time of the passage and approval by congress of the Act containing Section 5, the Texas & Pacific Railway Company was the only railroad in the United States operating under a federal charter and by virtue thereof having the right to sue or be sued in the courts of the United States. It was also asserted that because of the original jurisdiction of the United States Courts in suits in which this railway company was the defendant it had and enjoyed the right of removal from the state courts to the United States Courts under the provisions of the Removal Act. It is stated that the Congress had in mind the defendant company in incorporating the foregoing clause in the laws relating to the judiciary.

Counsel for the complainant contends that the reasoning of Chief Justice Marshall in Osborn v. The Bank came in process of time to be forgotten and dropped out of sight, and that there came to exist the substantive bare fact that a federal charter gives federal jurisdiction. Upon this contention counsel bases his interpretation of the meaning and effect of Section 5. He argues that the purpose and intention of Congress was to do away with the jurisdiction in the United States Courts of cases brought by or against a railroad company where such jurisdiction has heretofore obtained as he contends, by virtue of the mere possession by the company of a federal charter.

The construction sought to be place- upon this section by counsel would separate and divorce the Act of congress incorporating a railroad company from the substance of the Act granting to the company its functions, powers, and privileges. Such a construction is impossible. It would limit and circumscribe the meaning of section 5 in a manner I am sure, not contemplated by congress. It would render the process of reasoning indulged by Chief Justice Marshall in the Bank case without pertinence and unavailing to support the conclusion reached by him. It would deprive the Supreme
166 Court of the premises always and uniformly entertained by it in reaching and indulging its conclusion that a federal charter in connection with its provisions involves at least potentially, a federal question. Besides: In event the court should place the construction upon section 5 limiting and circumscribing its effect and

operation, continued uncertainty would obtain as to whether or not the facts in a given case caused it to fall within or without the provisions of this section. This would be a very unhappy situation and one calculated to promote confusion rather than order. A federal charter with its form and substance should be treated as an inextricable identity.

That the bill of complaint in this cause praying a foreclosure of the second mortgage of the Texas and Pacific Railway Company, and for injunction, accounting and other equitable relief raises federal questions because of the fact this railway is incorporated under an Act of Congress authorizing the making of the mortgage contract complainant seeks to foreclose, is unquestioned. But these federal questions arising only by virtue of the law of its incorporation have been rendered of no avail by section 5, of the Act approved January 28th, 1915, so far as the conferring of jurisdiction on this court is concerned. It is not contended that other and different federal questions are pleaded or relied upon in the conferring of such jurisdiction.

Argument has been made by counsel for complainant seeking to sustain the jurisdiction of the court on the ground of diversity of citizenship, it being urged that complainant is a citizen of the State of New York and the defendant Railway Company is a resident and citizen of Texas. In my opinion the allegations of the bill pertaining to jurisdiction are not sufficient to warrant the court in entertaining this contention.

The bill will therefore stand dismissed.

EDWARD R. MEEK, *Judge.*

167 *Plaintiff's Petition for Appeal with Endorsed Allowance.*

Filed March 3rd, 1916.

Plaintiff's Petition for Appeal.

To the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas:

Bankers Trust Company, as Trustee, the plaintiff in the above styled cause, conceiving itself aggrieved by the decree therein entered of date February 23, 1916, whereby its amended bill of complaint was dismissed as to both defendants, without decision upon the merits and solely upon the ground that the court was without jurisdiction to entertain the same, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in its assignment of errors filed herewith; and it prays that its appeal be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

LOCKE & LOCKE,
ALEXANDER & GREEN, L.,
Solicitors for Plaintiff.

MAURICE E. LOCKE,
W. W. GREEN, L.,
Of Counsel for Plaintiff.

The foregoing claim of appeal is allowed for reference to the jurisdictional question which alone is involved. Done at Dallas, Texas, this the 3rd day of March, 1916.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

168 *Order Allowing Appeal.*

Filed March 3, 1916.

Order Allowing Appeal in Open Court.

On this the 3rd day of March, 1916, comes on to be heard in open court the petition of the plaintiff in the above styled cause for an appeal to the Supreme Court of the United States from the decree entered of date February 23, 1916, dismissing the amended bill of complaint as to both defendants solely upon the ground that the court was without jurisdiction to entertain the same; and upon consideration said appeal is allowed for the review of said decree with reference to the jurisdictional question which alone is involved.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

169 *Plaintiff's Assignment of Errors.*

Filed March 3rd, 1916.

In the District Court of the United States for the Northern District of Texas, Sitting at Dallas.

In Equity. No. 2795/51.

BANKERS TRUST COMPANY, as Trustee,
v.
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY.

Plaintiff's Assignment of Errors.

In connection with its petition for an appeal this day filed in the above styled cause, the plaintiff assigns the following errors committed upon the trial thereof.

1.

The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

2.

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause by reason of the express grant of such jurisdiction in the act of congress of March 3, 1871.

3.

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the constitution or laws of the United States.

170 4.

The court erred in holding that it had not jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different states.

For the reasons hereinbefore assigned, the plaintiff prays that the decree entered in said cause of date February 23, 1916, be reversed by the Supreme Court of the United States, and that said cause be remanded to the District Court of the United States for the Northern District of Texas with instructions to take jurisdiction of the same and to hear and determine the merits thereof.

LOCKE & LOCKE,
ALEXANDER & GREEN, L.,
Solicitors for Plaintiff.

MAURICE E. LOCKE,
W. W. GREEN, L.,
Of Counsel for Plaintiff.

171 *Plaintiff's Appeal Bond.*

Filed March 3, 1916.

Plaintiff's Appeal Bond.

Whereas, in the above styled cause, then pending in the District Court of the United States for the Northern District of Texas, sitting at Dallas, said court did, on to-wit February 23, 1916, render a final decree dismissing said cause as to both the defendants without consideration of the merits thereof, and solely upon the ground that said court was without jurisdiction to hear and determine the same. And whereas the plaintiff has taken an appeal to the Supreme Court of the United States to reverse said decree.

Now, therefore, know all men by these presents that the said plaintiff, Bankers Trust Company, a private corporation having its domicile in the city, county and state of New York and suing and acting herein as a trustee as set forth in its amended bill of complaint, as principal, and as surety American Surety Company, a private corporation having its domicile in the city, county and state of New York and authorized by its charter and by compliance with the laws of the state of Texas to do business in Texas as a surety company, do hereby acknowledge themselves jointly and severally bound unto the said defendants The Texas and Pacific Railway Company, a private corporation having its domicile in the city and county of Dallas and state of Texas, and New Orleans Pacific Railway Company, a private corporation having its domicile in the city of New Orleans, parish of Orleans, and state of Louisiana, in the sum of one thousand dollars, well and truly to be paid to them or to their successors or assigns.

The condition of this bond, however, is such that if said Bankers Trust Company, as Trustee, shall prosecute its appeal to effect, and, if it shall fail to make its appeal good, shall answer all costs,
172 then this bond shall become null; otherwise, it shall remain in full force and effect.

In testimony whereof said Bankers Trust Company, as Trustee, has caused these presents to be signed in its name and behalf by Maurice E. Locke, one of its solicitors of record and its agent thereunto duly authorized; and said American Surety Company has caused these presents to be signed in its name and behalf, and its corporate seal to be thereunto affixed, by its agent J. W. Blanton and its resident secretary R. L. Stennis, thereunto duly authorized, at Dallas, Texas, this the 3rd day of March, 1916.

BANKERS TRUST COMPANY,
As Trustee,
By MAURICE E. LOCKE,
Its Solicitor and Agent.

[SEAL.] AMERICAN SURETY COMPANY,
By J. W. BLANTON, *Its Agent, and*
R. L. STENNIS, *Its Resident Secretary.*

The amount of the plaintiff's appeal bond is hereby fixed at one thousand dollars and the foregoing bond is hereby approved, this the 3rd day of March, 1916.

E. R. MEEK,
Judge of the District Court of the United States for the Northern District of Texas.

173 *Plaintiff-Appellant's Præcipe for Transcript.*

Filed March 3rd, 1916.

Plaintiff-Appellant's Præcipe for Transcript.

The clerk will please to include in the transcript, and among the papers, to be transmitted to the Supreme Court of the United States

in connection with the appeal of the above styled cause copies of papers and original papers as follows, towit.

1. Back of original bill of complaint, showing nature of document and clerk's file-mark.

2. Title page of amendments to original bill of complaint, showing nature of document and clerk's file-mark.

3. Plaintiff's amended bill of complaint.

4. Motion of defendant New Orleans Pacific Railway Company to dismiss as to it.

5. Motion of defendant The Texas and Pacific Railway Company to dismiss the bill.

6. Back of original answer of defendant The Texas and Pacific Railway Company's original answer, showing nature of document and clerk's file-mark.

7. Title page of defendant The Texas and Pacific Railway Company's amendments to its orignal answer, showing nature of document and clerk's file-mark.

8. Amended answer of defendant The Texas and Pacific Railway Company.

9. Order of dismissal.

10. Memorandum opinion of district judge.

11. Petition for appeal and endorsed allowance thereof.

12. Allowance of appeal in open court.

13. Assignment of errors.

14. Appeal bond.

14½. This præcipe and acknowledgment of service thereof.

Original Papers.

15. Citation on appeal and endorsed admission of service thereof.

174 LOCKE & LOCKE,
ALEXANDER & GREEN, L.,
Solicitors for the Plaintiff-Appellant.

Receipt of a copy of the foregoing præcipe is hereby acknowledged this the 3 day of March, 1916.

T. J. FREEMAN,
GEO. THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
Solicitors for Both the Defendants-Appellees.

175 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, within thirty days from the date of this writ, pursuant

to an appeal, duly allowed by the District Court of the United States for the Northern District of Texas and filed in the clerk's office of said court on the 3rd day or March, 1916; in a cause wherein Bankers Trust Company, as Trustee, is the appellant and you are the appellees, to show cause, if any, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this the 3rd day of March, 1916.

E. R. MEEK,
United States District Judge for the Northern District of Texas.

Attest with seal.

[The Seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk of the District Court of the United States for the Northern District of Texas.

176 Service of the foregoing citation and receipt of a copy thereof are hereby admitted this the 3 day of March, 1916.

T. J. FREEMAN,
GEO. THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
Solicitors for The Texas and Pacific Railway Company and for New Orleans Pacific Railway Company.

177 [Endorsed:] In Equity, No. 2795/51. Bankers Trust Company, as Trustee, v. The Texas and Pacific Railway Company and New Orleans Pacific Railway Company. Citation on Appeal. Filed 3 day of M'ch 19—. Louis C. Maynard, clerk.

178 *Clerk's Certificate.*

I, Louis C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, do hereby certify that the above and foregoing is a true and correct transcript of the record, assignments of error and all proceedings had upon the motions of the respective defendants to dismiss the bill of complaint in cause No. 2795/51, In Equity, Bankers Trust Company, as Trustee, complainant and the Texas and Pacific Railway Company and the New Orleans Pacific Railway company, defendants, as fully as the same remain on file and of record in my office at Dallas, Texas, except that the original citation on appeal is included herein instead of a copy thereof.

Witness my hand officially and the seal of said District Court, at

Dallas, Texas, this the 4th day of March A. D. 1916, and of American Independence the 140th year.

[The Seal of the U. S. District Court, Northern Dist. Texas, Dallas.]

LOUIS C. MAYNARD,
Clerk of said Court.

Endorsed on cover: File No. 25,172. N. Texas, D. C. U. S. Term No. 889. Bankers Trust Company, as trustee, appellant, vs. The Texas & Pacific Railway Company and New Orleans Pacific Railway Company. Filed March 10th, 1916. File No. 25,172.

Office Supreme Court, U. S.
FILED
MAR 14 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

MOTION TO ADVANCE.

MAURICE E. LOCKE,
WILLIAM W. GREEN,
Solicitors for Appellant.

FREDERIC D. McKENNEY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND NEW ORLEANS PACIFIC RAILWAY COMPANY, APPELLEES.

MOTION TO ADVANCE.

Now comes the above-named appellant, the Bankers Trust Company, as trustee, and because of the special and peculiar circumstances attending the matters with which this appeal is concerned and the very considerable public interests which are involved therein, moves this honorable court to advance this case, under the provisions of paragraph 7 of rule 26, for hearing out of its regular order in the call of the docket, and as the only matter open for argument on this appeal is one of jurisdiction *vel non* of the United States District Court for the Northern District of Texas, and it is believed that such question can be satisfactorily argued in one hour of

thirty minutes to each side, it is respectfully suggested that the case be ordered to the summary docket for hearing under the provisions of paragraph 6 of rule 6 of this court.

As grounds for such motion appellant respectfully states and shows as follows, to wit:

The sole question for the consideration of this court upon this appeal is as to the jurisdiction *vel non* of the United States District Court for the Northern District of Texas (Hon. Edward R. Meek, district judge, sitting) to entertain the bill of complaint herein.

The appeal was prayed direct to this court by Bankers Trust Company, as trustee, complainant below, and duly allowed by the district court on March 3, 1916, to review the order and decree of the latter court passed on the 23d day of February, A. D. 1916, dismissing said bill of complaint, the order allowing said appeal being as follows, viz:

Order Allowing Appeal in Open Court.

> "On this the 3d day of March, 1916, comes on to be heard in open court the petition of the plaintiff in the above styled cause for an appeal to the Supreme Court of the United States from the decree entered of date February 23, 1916, dismissing the amended bill of complaint as to both defendants solely upon the ground that the court was without jurisdiction to entertain the same; and upon consideration said appeal is allowed for the review of said decree with reference to the jurisdictional question which alone is involved.
>
> "E. R. MEEK,
> *"United States District Judge for the Northern District of Texas."*

Appellant's amended bill of complaint was filed in said district court in its character as trustee under the second mortgage of The Texas and Pacific Railway Company and New Orleans Pacific Railway Company securing an issue of

second mortgage income bonds of The Texas and Pacific Railway Company, limited in aggregate principal amount to $25,000,000, of which there are more than $24,000,000 principal amount now outstanding. The bill alleges default made in the payment of interest on said income bonds for a number of years past; that the net income of The Texas and Pacific Railway Company applicable to the payment of interest on said income bonds has been systematically diverted to purposes other than the payment of such interest, in violation of the provisions of said income bonds and said second mortgage, and prays for an accounting and foreclosure. It further alleges that The Texas and Pacific Railway Company is insolvent; that its property holdings, including its lines of railway, are in danger of being broken up by separate suits, judgments, executions, and attachments, and prays for the appointment of a receiver and an injunction.

Upon such amended bill and papers in support thereof motion was made in said district court by said appellant for immediate preliminary relief pending the hearing on the merits and asking the appointment of a receiver and an injunction, among other things, against further diversion of net income. The Texas and Pacific Railway Company thereupon moved to dismiss the bill for alleged lack of jurisdiction on the part of the district court as a Federal court to entertain the same, and the New Orleans Pacific Railway Company also moved for dismissal as to it. Both motions having come on to be heard on February 16, 1916, and succeeding days, the motion of The Texas and Pacific Railway Company was granted and the bill was dismissed as to both defendants on the sole ground that the court was without jurisdiction to entertain the same because of the provisions of the act of Congress approved January 28, 1915 (38 Stats. at L., 803, 804, chap. 22, sec. 5), reading as follows:

> "SEC. 5. No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress."

REASONS FOR ADVANCEMENT.

The railroad system of The Texas and Pacific Railway Company, one of the appellees here, is more than 1,800 miles in length and extends through the States of Texas, Louisiana and Arkansas, and is a great public highway of interstate commerce, as well as by the terms of its charter a military and post-road of the United States. The inhabitants of said States and the traveling and shipping public generally, as well as the governments of said States and of the United States itself, are immediately and directly interested in the continuous and efficient operation of said railway company as a single entity. It has made default in payment of its promissory notes aggregating more than $3,400,000 principal amount, which matured on June 1, 1915. Suit has been instituted and is now pending in the Supreme Court of New York against said appellee by the holders of more than $1,700,000 principal amount of said notes, and certain property of the appellee, to wit, its cash account and large amounts of securities in its treasury, has been taken into judicial custody under attachment proceedings in said suit: said holders of said notes have also commenced attachment proceedings in the State courts of Louisiana against other property of said appellee, and there has also been taken and is now in judicial custody under said proceedings a large amount of its property. Other holders of more than $800,000 principal amount of said notes also have instituted suit thereon against said appellee in the United States District Court for the Western District of Louisiana, and holders of an approximately like principal amount have instituted suit thereon against the appellee in the State courts of Texas. The pendency of such suits and of this cause has further shattered and impaired the previously weakened credit of the appellee and seriously embarrasses the necessary financing to provide for current repairs

to road-bed and equipment, and tends to prevent adequate provision being made to meet the requirements of the traveling and shipping public and of the Interstate Commerce Commission and of the railroad commissions of said States. The attachment proceedings in two of said suits embarrass and hinder the actual conduct of the financial affairs of the appellee and the operation of its road.

There is grave danger that long before this cause will be reached for argument in the regular call of the docket of this court judgment will have been obtained in some or all of said suits, and of other suits which may be instituted against the appellee, and that its railway lines will be levied upon and sold in parcels, thus sacrificing and dismembering its system, to the detriment, not only of your orator and of all stockholders, bondholders, and creditors of the appellee, but also of the inhabitants of said States of Texas, Louisiana, and Arkansas particularly and of the traveling and shipping public generally and of the United States Government. Public interest, as well as the interest of security holders, demands that the property of the appellee be placed in the custody and control of a court of equity, which can protect it against judgments and dismemberments and administer it in the interests of all concerned. The limited jurisdiction of State courts renders their procedure entirely inadequate for such purposes, and would necessitate separate administration by several courts of independent jurisdiction, operating under different systems of law. The only court of equity which can adequately protect and administer said property is a United States district court, but until the question of jurisdiction underlying this appeal shall have been disposed of by this court it is very doubtful whether any action by such court directed to such end can be taken. There is grave danger that applications for several receivers may be made in various State courts during the pendency of this appeal if the hearing thereof should be delayed, and that such applications may result in conflicting administrations

of the properties of the Texas and Pacific Railway Company, all of which action would necessarily be superseded by the appointment of a receiver in this cause in case this court should ultimately determine that the district court has jurisdiction of this cause.

The past course of the appellee railway company, as disclosed by the bill, shows that said company denies the rights of the appellant, and will persist in disregarding them and in diverting its net income and placing the same beyond the reach of the appellant, unless restrained by the interlocutory injunction sought; but no injunction for the appellant's protection pending the suit can be had until the question of jurisdiction shall have been determined by this court.

Wherefore appellant prays that this case may be advanced and assigned for argument on such day as may suit the convenience of the court.

MAURICE E. LOCKE,
WILLIAM W. GREEN,
Solicitors for Appellant.

FREDERIC D. McKENNEY,
Of Counsel.

SIRS: Please take notice that on the 16th day of March, 1916, at 12 o'clock noon, or as soon thereafter as counsel can be heard, the foregoing motion to advance this cause and assign same for argument will be submitted to the Supreme Court of the United States.

Dated New York, March 11, 1916.

MAURICE E. LOCKE,
Prætorian Building, Dallas, Texas,
WILLIAM W. GREEN,
120 *Broadway, New York City,*
Solicitors for Appellant.

To

THOMAS J. FREEMAN,
GEORGE THOMPSON,
FLIPPEN, GRESHAM & FREEMAN,
CHADBOURNE & SHORES,
Solicitors for Appellees.

Service of a copy of the foregoing motion to advance and notice of intention to submit same is admitted this eleventh day of March, 1916.

CHADBOURNE & SHORES,
Solicitors for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, *as Trustee, Appellant,*
against
THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY, *Appellees.*

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

ADOLPH DENZAU, being duly sworn, says that he is upwards of twenty-one years of age and is employed in the office of William W. Green, one of the solicitors for the appellant herein; that on the 11th day of March, 1916, he did serve upon The Texas and Pacific Railway Company, one of the appellees herein, a copy of the annexed motion to advance by delivering a true copy of said motion to advance to C. W. Veitch, the secretary and treasurer of said The Texas and Pacific Railway Company, at his office, No. 165 Broadway, in the City of New York (Borough of Manhattan), New York, and by leaving the same with him.

Deponent further says that he knows the said C. W. Veitch so served as aforesaid to be the secretary and treasurer of said The Texas and Pacific Railway Company.

ADOLPH DENZAU.

Subscribed and sworn to before me this 11th day of March, 1916.

[NOTARIAL SEAL.] R. DAMM,
Notary Public, Kings County.

Certificate filed in New York County, No. 54.

[Endorsed:] Copy. In the Supreme Court of the United States. No. 889. O. T., 1915. Bankers' Trust Company, as trustee, appellant, *vs.* The Texas and Pacific Railway Company and New Orleans Pacific Railway Company, appellees. Motion to advance.

Office Supreme Court, U. S.
FILED
MAR 16 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

BANKERS TRUST COMPANY

versus No. 889

THE TEXAS & PACIFIC RAILWAY CO., ET AL.

Motion of Railroad Commission of Louisiana, Amicus Curiae, to Advance.

W. M. BARROW,
Assistant Attorney General.

Supreme Court of the United States

BANKERS TRUST COMPANY

versus No. ——

THE TEXAS & PACIFIC RAILWAY CO., ET AL.

Motion of Railroad Commission of Louisiana, Amicus Curiae, to Advance.

Now comes the Railroad Commission of Louisiana, and, praying leave to appear as amicus curiae in this cause, says, that it is a matter of public interest to the State of Louisiana, its citizens, and shippers, who travel and ship over the Texas & Pacific Railway and who do and may at any time have litigation with the said Texas & Pacific Railway, that the question of jurisdiction involved herein be determined as speedily as possible, and, in order that the defendant may perform its function as a common carrier to the best interests of all concerned, it is necessary that the jurisdictional question and the issues involved in this litigaton be determined without delay. Wherefore, the Railroad Commission of Louisiana moves that this cause be advanced and placed upon the summary docket, to be heard and disposed of as soon as convenient to the Court.

RAILROAD COMMISSION OF LOUISIANA.

W. M. BARROW,

Assistant Attorney General.

Office Supreme Court, U. S.
FILED
MAR 16 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.
No. 884.

BANKERS TRUST COMPANY, AS TRUSTEE,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE NEW ORLEANS PACIFIC RAILWAY COMPANY,
Appellees.

ANSWER OF THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE NEW ORLEANS PACIFIC RAILWAY COMPANY TO APPELLANT'S MOTION TO ADVANCE.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
Solicitors for Appellees.

T. L. CHADBOURNE,
A. J. SHORES,
Of Counsel.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 889.

BANKERS TRUST COMPANY, as Trustee,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY and THE NEW ORLEANS PACIFIC RAILWAY COMPANY,
Appellees.

Answer of The Texas and Pacific Railway Company and The New Orleans Pacific Railway Company to Appellant's Motion to Advance.

Now come the Appellees herein, The Texas and Pacific Railway Company and The New

Orleans Pacific Railway Company, and for answer to the motion of Appellant filed herein March 11, 1916, to advance this cause under the provisions of Paragraph 7, Rule 26, of this Court, and asking that this cause be ordered to the Summary Docket for hearing under the provisions of Paragraph 6 of Rule 6, of this Court, answering, says:

That this cause is not such a one as should be advanced for summary hearing under said rules, but that same should be heard in regular order on the call of the docket.

Appellees admit as true the statement that the only matter open for argument is one of jurisdiction of the United States District Court of the Northern District of Texas, but they state that such question cannot be satisfactorily argued in one hour of thirty minutes to each side. On the contrary, Appellees say that to limit the argument to thirty minutes for each side would, in effect, be equivalent to submitting the cause without argument, as the questions of law involved are intricate and to be fairly and fully presented to this Court will require and consume much more time than that provided by the rules of this Court for causes advanced for summary hearing.

That the sole question submitted to and determined by the Court below—viz., the United States District Court for the Northern District of

Texas (Hon. E. R. Meek, District Judge)—was the jurisdiction of said Court over this action by reason of the provisions of the Act of Congress approved January 25, 1915 (38 Stat. at L. 803, 804, Chap. 22, Sec. 5), reading as follows:

> "Sec. 5. No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."

That said Act of Congress has never been before any court for construction, and that arguments on this question in the Court below consumed the greater portion of five days.

That said question of jurisdiction is the only question to be submitted to this Court for review, and that the appeal to this Court was allowed with reference to said question alone.

That if such question is to be argued before this Court much more time than thirty minutes to each side must necessarily be consumed by such argument.

That the determination of this question of jurisdiction is of vital importance to the Texas and Pacific Railway Company inasmuch as it involves not only the jurisdiction of this cause but also the right of said company to sue and be sued in the Courts of the United States, a right which said

company has uniformly exercised and invoked for more than forty years, and in the decision of said question it is important that this Court should be advised to the fullest extent of all considerations and arguments bearing thereon and ample opportunity granted to the Texas and Pacific Railway Company to present such question in all of its aspects and phases.

The Appellee, The Texas and Pacific Railway Company, would state that, in truth and fact, it is the only real defendant in this cause, as its co-defendant, The New Orleans Pacific Railway Company, has no substantial interest in said cause. That this Appellee, The Texas and Pacific Railway Company, has filed its amended answer to Complainant's amended bill in this cause, and in said answer it has expressly denied that it is indebted to the Plaintiff in any amount and has expressly denied that Complainant is entitled to any recovery against it for any sum, or to any right of foreclosure of said Second Mortgage. That no default has been made by this Appellee in any of the conditions or obligations imposed by said Second Mortgage. This Appellee has further expressly denied in said answer that it is insolvent.

That this cause was instituted at the request of the receiver of the St. Louis, Iron Mountain and Southern Railway Company—the same individual

who is also receiver of The Missouri Pacific Railway Company—as a part of a plan or scheme for the acquisition of the property of The Texas and Pacific Railway Company by or in the interest of The Missouri Pacific Railway Company, which said acquisition by The Missouri Pacific Railway Company is contrary to and prohibited by law and will constitute a violation of the statutes of the United States—especially the Sherman Anti-Trust statute—as well as a combination in restraint of trade and a monoply of interstate trade, whereby competition in interstate commerce would be unduly restricted and suppressed. That shortly after the filing of the bill of complaint in this cause, and for the purpose of emphasizing and sustaining those portions of said bill which alleged the inability of The Texas and Pacific Railway Company to meet certain of its matured notes, the receiver of St. Louis, Iron Mountain and Southern Railway Company—said company being the owner of a large amount of said notes—caused an action to be instituted upon the same against The Texas and Pacific Railway Company in the United States District Court for the Eastern District of Louisiana; and shortly thereafter, and by reason of the action so taken by said receiver, the Union Trust Company of New York, as pledgee of a

large amount of said notes, owned by The Missouri Pacific Railway Company, also caused an action to be instituted in respect thereof against The Texas and Pacific Railway Company in the State Court at Dallas, Texas. That in its amended answer to the amended bill of complaint in this cause this appellee has pleaded that it has a good and substantial defence to the above actions instituted in respect of the afore said notes.

That the only other action which has been instituted in respect of notes of this appellee is an action instituted by the Estate of Jay Gould in the Supreme Court of the State of New York, which said action was so instituted solely because of the institution of this cause, and that it is not true, as stated in said motion, that said suits or any proceedings therein has embarrassed and hindered the financial affairs of the appellee or the operation of its road; neither is it true, as stated in said motion, that public interest, as well as the interest of security holders, demands that the property of this appellee be placed in the custody and control of a court of equity, but, on the contrary, the sole purpose and object for the institution of this cause and the application by the complainant herein for a receiver of the railroads and property of this appellee is to secure, through the

aid of the Federal Courts and by authority of their decrees, the ownership and control of the property of the appellee by The Missouri Pacific Railway Company, as a result of which ownership and control the natural competition in interstate commerce between said companies would be suppressed and their operation would be secured to a single dominating control, which would be exercised primarily for the benefit and advantage of The Missouri Pacific Railway Company.

That the matters and things complained of in Complainant's bill have existed for a period of more than twenty-six years and with full knowledge of such conditions as to the payment or non-payment of interest on the Second Mortgage Bonds of this Company, said Trustees and said Bondholders have acquiesced in the action taken by the Board of Directors of the Texas and Pacific Railway Company as to the payment or non-payment of interest on said Income Bonds.

That, in truth and in fact, this Appellee has fully carried out and performed all of the conditions and obligations imposed upon it by said Second Mortgage and in no instance has it diverted funds from their proper source or applied same to any other purpose not specifically called for by said Mortgage. This Appellee would further

state that the grave dangers outlined in the motion filed herein, either as to the public or as to the stockholders of this Appellee, only exist in the imagination of Appellant's counsel and not in reality. That the credit of this Appellee, prior to the institution of this cause, was unquestioned. That the effect of bringing the present suit was a libel upon the credit of this Appellee. That this Appellee was, and is now, meeting all of its commercial obligations of every kind, and this Appellee now reiterates, as its answer to this motion what it has specifically set out in its answer to the bill of complaint herein, —that it is not indebted to the complainant therein in any sum.

That it has not breached in any wise any provi sion of the Second Mortgage and that the Complainant herein has no just cause of action.

In further answering said motion to advance, the Appellees ask that this cause be regularly docketed and that the Appellees be given a full and fair opportunity to properly present to this Court the questions involved herein, and they respectfully submit that said questions cannot properly and fairly be submitted if this cause is placed upon the summary docket and the argument limited to thirty minutes on each side.

Wherefore, they resist said motion to advance and ask that same be denied.

THOMAS J. FREEMAN,
GEORGE THOMPSON,
Solicitors for Appellees.

T. L. CHADBOURNE,
A. J. SHORES,
Of Counsel.

To

ALEXANDER & GREEN,
LOCKE & LOCKE,
Counsel for Appellant,
Bankers Trust Company.

Service of a copy of the foregoing Answer to Motion to Advance is admitted this 15th day of March 1916.

Solicitors for Appellants.